

No. 11992

United States
Court of Appeals

for the Ninth Circuit

POWER SERVICE CORPORATION,
a Corporation,

Appellant,

vs.

W. E. JOSLIN, doing business as CORY-JOSLIN
and MACNSONS,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 401 to 790

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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(Testimony of W. Lyle Borst.)

Mr. Watts: That is objected to as calling for a conclusion of the witness. It calls for a legal conclusion. [507]

The Court: He may answer, subject to your objection.

Q. That breach is as I have stated, on the alleged fact that the agreement stated that all of the materials was in storage before you made your bid?

A. We interpreted the specifications to be that all basic material was on the site.

Q. When you made your bid, which was on that date,—you interpreted this contract to state that all of the essential necessary materials for the erection of Power House No. 1 was on the site?

A. That is right.

Q. Now, Mr. Borst, can you point out in this contract where that was stated, or the clause from which you made this interpretation?

A. The clause showed,—I will say this: The general idea was advanced that nearly all of the materials were stored on the site. That was advanced by certain clauses in the contract.

Q. The general idea was advanced that nearly all of the materials,—you mean there was a clause in the contract that says “nearly all of the materials” were stored on the site? A. Yes, sir.

Q. And that is what you based your statement on? A. Yes. [508]

Q. Is there anything else in the contract on which you base that statement?

A. Not with respect to the materials.

(Testimony of W. Lyle Borst.)

Q. Now this contract dated July 11th, 1944—strike that please, Mr. Reporter. You made a bid on the specifications which are a part of the contract on July 8th, 1944?

A. That is right.

Q. Prior to making this bid you received specifications which are a part of this contract?

A. Yes, sir.

Q. And you had this contract—or these specifications in your hands on June 17th, 1944?

A. I don't think that we got them on that particular date, but it was shortly thereafter.

Q. Did you not testify that you received the specifications on June 17th, 1944?

A. I had forgotten the date of the letter that we received at the time we went to Kansas City, but the date was established at that point, I believe.

Q. I think you testified that you received a phone call? A. Yes.

Q. You received a phone call about June 16th asking if you wanted to make a bid, and the specifications were mailed in Kansas City on June 15th?

A. As I remember it, we went to Kansas City and picked up the specifications.

Q. You read the specifications over thoroughly?

A. Yes, sir.

Q. And there was nothing in these specifications that you misunderstood?

A. No, I didn't misunderstand them.

Q. You know that the specifications called for

(Testimony of W. Lyle Borst.)

you to make a check—a physical check of all of the property and to base your bid upon that?

A. The specifications gave an opportunity for an inspection of the works.

Q. Now, Mr. Borst, that was approximately three weeks before you submitted your bid, from June 17th to July 8th, was about three weeks?

A. I think the actual time that these specifications came out, that it was considerably later than that, the actual time the specifications came out—yes, it was later. The fact of the matter is that the blue prints which are a part of the exhibit were not available at the start of the job.

Q. That is true, but the contract provides that the blue prints may be submitted later. I am talking about the specifications. [510]

A. I am very definite that we didn't have that much time to prepare that bid. It may not be all-important, but I know that we only had a week or ten days at the most.

Q. The best of your recollection is, Mr. Borst, that you received the telephone call about June 15th, or 16th, and you went to Kansas City and obtained the specifications?

A. There was some days between those points.

Q. Well, that was approximately June the 17th?

A. I think it was later than that.

Q. Did your counsel make a proposed statement of fact that there was a telephone request as to whether you wanted to make a bid, and that being

(Testimony of W. Lyle Borst.)

on July 17th, when Colonel Taylor contacted the vice-president of the corporation, and that you, the chief engineer, and two other employees of the plaintiff immediately got on the train and went to Kansas City, and that you went to the office of the A-E-M and obtained a copy of the specifications about June 17th?

A. We went to Kansas City after the letter was received—shortly after the letter was received. I would say that it was probably the first of the following week, whatever that would have been.

Q. And you took two other employees with you when you went to Kansas City? A. Yes, sir.

Q. And then, Mr. Borst, as soon as you received the specifications [511] you started to make a physical check of the project to see what you were going to base your bid on?

A. That is right.

Q. Who were these two men that went with you?

A. Mr. H. E. Brockhoff and Mr. M. D. Forkey.

Q. Mr. Hobbs was the boiler superintendent of the plaintiff corporation? A. Yes.

Q. He was not with you at that time?

A. No, sir; he wasn't.

Q. Now, Mr. Borst, in accordance with the specifications you started to check and see what bid you would make? A. Yes, sir.

Q. You spent approximately two days, or parts of two days making this check?

A. We were there parts of two days.

(Testimony of W. Lyle Borst.)

Q. In making these checks? A. Yes.

Q. And then you went back to the home office and then submitted your bid? A. Yes, sir.

Q. You didn't make any further check than that?

A. No, sir; that was the arrangement.

Q. And then the bid which you submitted, which was plaintiff's [512] exhibit 1-C, I believe, was submitted on July 8th, 1944? A. Yes, sir.

Q. And you read over this bid and were thoroughly familiar with it? A. Yes, sir.

Q. Along with the bid which had a mimeographed form with typewritten insertions in it, and your name, and the sum of the bid written in ink, you appended a pamphlet concerning the Power Service Corporation? A. That is right.

Q. Which included a statement of the contracts awarded to you before? A. That is right.

Q. And the purpose of that was to inform the contractor of your background?

A. That is right.

Q. And the pamphlet stated that the company owned sufficient equipment to fulfill any obligation which it undertakes? A. That is right.

Q. Did you intend that the contractor would rely upon that statement?

A. That bulletin applies to the Fegels Construction [513] Company and the Power Service Corporation.

Q. But they are alter egos of each other?

(Testimony of W. Lyle Borst.)

A. Well, we have facilities to draw on from one company to the other.

Q. This does not differentiate at all between the Power Service Corporation and the Fegels Construction Company?

A. Not in the bulletin.

Q. Now, Mr. Borst, while we are on the subject on this bid, the bid was signed by yourself?

A. Yes, sir; I think it was.

Q. On behalf of the Power Service Corporation?

A. Yes, sir.

Q. It specifies over your signature that performance will begin within five after receipt of notice to proceed. That is in paragraph 1-05 of the specifications?

A. Yes, sir.

Q. You understood that?

A. Yes, sir.

Q. There was no misunderstanding, or no interpretation that it was any different than in the specifications, which was a part of your contract?

A. No.

Q. You understood that paragraph 1-05?

A. Yes, sir.

Q. And you understood by that that you would accept any [514] additional time—I will read this: It is clause (e): “In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract in full satisfaction of any delays encountered, and

(Testimony of W. Lyle Borst.)

the constructor will not be liable for any costs or expenses incurred by the subconstructor as a result of the increased time for completion of the sub-contract."

A. That was a part of the original mimeographed form, I believe.

Q. Now then, Mr. Borst, up to the time that you made your bid, which was on July 8th, there was no misunderstanding or mix-up or mistake by anyone, was there?

Mr. Watts: That is objected to as calling for a conclusion.

The Court: He may answer.

A. We were relying entirely on the specifications.

Q. (Mr. Scholz, continuing:) Up to that time, that is, the time of your bid, and the time it was accepted, which was on July 10th — strike that please. You received instructions to proceed with the contract on July 13th? A. Yes, sir.

Q. Up to that time there was no mistake or no misrepresentation [515] by anyone, or anything said to you by anyone which caused you to put any different construction upon this contract which you had accepted by your bid?

A. On the twelfth, that was the day I learned from Major Matthews that there would be a shortage of important materials.

Q. On July 12th Major Matthews stated there was a shortage of materials? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. Did you have any information—strike that. You knew prior to July 12th that there was a shortage of materials?

A. We knew there would be a shortage of minor materials.

Q. As a matter of fact—you said there was a shortage of minor materials? A. Yes.

Q. You based that on the statement contained in the specifications that “nearly all” of the materials were there?

A. Yes, sir; that is right.

Q. And then it was your conclusion that that meant merely minor materials?

A. That was the interpretation of all of us who prepared the bid.

Q. Isn't it true that on contracts of this kind you base the cost amount—if there is a percentage of materials missing you base it on the value of that material? [516]

A. The value of material that might have been missing?

Q. Yes; if there are materials missing, we will say, of one per cent, or five per cent, you take that one per cent or five per cent from the total value of all materials? A. Yes, sir.

Q. And that is the usual construction practice, is it not? A. Yes.

Q. There was a million one hundred forty-five thousand dollars of this material?

A. That is right.

(Testimony of W. Lyle Borst.)

Q. That was the material installed?

A. That was the value of the material for this plant.

Q. That is the value of the material that you were going to install under your contract?

A. I understood the value of the materials purchased by Hercules Powder Company for this project was that amount.

Q. And there was an additional amount of money for materials above that which went into this contract?

A. My understanding was that this represented the total cost of the material that ultimately went into the plant.

Q. That was your understanding?

A. That was my understanding.

Q. And the actual materials short was less than one and one-half per cent of that amount? [517]

A. There is evidence that has been submitted here as to the shortage.

Q. Would you answer my question?

A. That is not the value of the missing material.

Q. What was the value of the missing material?

A. It was considerably in excess of that.

Q. What was the value of the missing materials? We have the total value now. Tell us, Mr. Borst, what was the value of the material that was missing.

A. We have not established that.

(Testimony of W. Lyle Borst.)

Q. You never figured that?

A. All the material found missing which we requisitioned which was supplied and which caused us no delay, that was not valued in money.

Q. Now, Mr. Borst, I read to you from your Exhibit No. 44 as follows: Paragraph seven of that exhibit, "Information obtained from Hercules Powder Company has disclosed that the total value of equipment procured for the power house was approximately \$1,145,000.00. Such information also disclosed the number of water-wall tubes required for each boiler to be as follows," and then I will skip a part in here, and it reads again in the same paragraph, "the total estimated value of the missing tubes is \$14,208.00." That is just a portion of the exhibit which I read, and then, Mr. Borst, in the letter [518] of the Chief Engineer dated March 12th, 1946, which is Plaintiff's Exhibit No. 45, it states as follows, in the third paragraph of the letter, "It appears from the records that the total value of equipment procured for the work to be performed under your contract was \$1,145,000.00, and that the estimated value of the missing equipment was \$14,208.00, approximately one and two-tenths per cent."

A. I would be glad to clarify that. These materials that I referred to in that percentage is representative cost of the water-wall tubes with respect to the installation material costs, but they do not take into account the multitude of materials

(Testimony of W. Lyle Borst.)

furnished which was short in the nature of pipe, bolts, nuts, flanges, and things of that kind.

The Court: I think we will recess at this time until two o'clock.

2:00 p.m., March 25, 1947

Q. Now, there is no question about there being bolts, nuts and things of that kind short?

A. There was a general classification of material which included valves, flanges and items which were obtainable from the area.

Q. They are right there on the site?

A. Yes, sir. [519]

Q. And it was a matter of an hour or so before you could have them?

A. Well, they were there on the site. It may be longer than that.

Q. But that has nothing to do with your claim which is before the Court now?

A. That is right.

Q. And we can disregard that?

A. Except that it is a part of the material which fills the blank between "nearly" and "all."

Q. But the material was not missing, but was not present at power house No. 1?

A. It was not available without a formal requisition.

Q. But the only concern is the alleged breach of contract by Mr. Joslin in regard to the tubes and headers? A. That is right.

Q. Did you make an inquiry—I mean by you, did the Power Service Corporation make an in-

(Testimony of W. Lyle Borst.)

quiry of Mr. Joslin, or his agents or representatives, in regard to those tubes and headers before you submitted your bid?

A. No, sir; I did not.

Q. Did you ever make inquiry of Mr. Joslin, or his agents or representatives, in regard to the tubes and headers as missing, that were missing at any time after you submitted your bid? [520]

A. As soon as it became—that is, as soon as I became advised by Major Matthews I discussed it immediately with Mr. Wedlick and Mr. Jung.

Q. At that interview with Mr. Wedlick you informed him that the tubes and headers were missing?

A. The tubes, at that time.

Q. That the tubes were missing?

A. Yes, sir.

Q. That is the first time you discussed it with the defendant, or any of his agents?

A. That is right.

Q. What date was that?

A. The fourteenth of July.

Q. The fourteenth of July? A. Yes, sir.

Q. So there was no mistake, or misrepresentation that occurred up to the time that you were ordered to proceed on July 13th?

A. Up to that time everything seemed to be in order.

Q. And now, no misrepresentations were ever made to the Power Service Corporation with respect to the tubes or headers being, or not being, on the site prior to your conference with Major Matthews?

(Testimony of W. Lyle Borst.)

A. That is the first—nothing prior to that conference.

Q. Therefore, as I understand, your alleged breach of [521] contract is the failure of Mr. Joslin to furnish tubes and headers when you required them; is that correct? A. Yes, sir.

Q. You depended on this clause 5-04(c) as a basis for whatever damage you may be able to prove, which clause says that “nearly all” of the materials are there?

A. That, and the fact that the materials that were there were not proper.

Q. That, and the fact that some of the materials you had to refinish?

A. There was the case of the header on No. 2 boiler that had to be refurnished entirely new from the original supplier, and also the improper header requiring tubes to be revamped by the use of swedge nipples. There were also other tubes that were improper and had to be resupplied new.

The Court: That still confines it to the water-wall tubes and the headers?

A. That is right, sir.

Q. Now, Mr. Borst, is it your understanding that on acceptance—that the general custom is that when a bid is made and that bid accepted that is a contract?

A. Depending on the exact documents, that is, the terms of the documents themselves.

Q. You may be correct, Mr. Borst. In this particular case [522] when you submitted your bid

(Testimony of W. Lyle Borst.)

and had it accepted, did you think that you had a contract or not?

A. We felt that we had in effect. There was the letter to proceed, and our intent to proceed, which would be sufficient until the contract itself was executed.

Q. You didn't consider that a definite contract?

A. No, these specifications provided — under these specifications, Mr. Scholz, the contract document said that it would not be a definite contract until it was fully approved.

Mr. Watts: That is in specification 1-29.

Q. (Mr. Scholz, continuing:) In other words, so that I will clearly understand you, Mr. Borst, you felt that when you got the order to proceed, and your bid had been accepted, you didn't have a definite contract until it was approved by the contracting officer? A. That is right.

Q. That was your understanding?

A. That is right.

Q. And also by the A-E-M?

A. That is correct.

Q. And in that connection you are referring to clause 1-29 of the specifications? A. Yes, sir.

Q. Now, Mr. Borst, as far as—let us refer back a couple [523] of questions—you said you also relied on defective material. Did you read section 5-04 of the specifications, that, is 5-04(c) on page 1-23 of the specifications which reads as follows, in part: "Materials, equipment and machinery which have been broken, or otherwise damaged beyond use, or

(Testimony of W. Lyle Borst.)

repair, during storage, or which have inherent defects in manufacture, or material, caused through no fault or negligence of the subconstructor will be replaced by the constructor without cost to the subconstructor." Did you have that in mind at that time?

A. Not that would be damaged. This was incorrect fabrication. This was an inherent defect, and not by reason of any storage or any subsequent moves.

Q. And it was not considered damaged or broken beyond use?

A. No, sir; it was absolutely improper material.

Q. Now, Mr. Borst, did you allege that there was any mistake in the drawing of this instrument?

A. Yes, sir. I don't think that it spoke the facts.

Q. You allege that the defendant made a mistake in drawing this instrument?

A. In effect, yes.

Q. What do you mean by that?

A. The instrument was prepared by others. He simply used [524] it and tendered it to the bidders.

Q. You allege—

A. (Interposing:) It was tendered to the bidders by the A-E-M for Joslin.

Q. You don't contend that Mr. Joslin made any mistake in drawing it up personally, or his company, or his agents or representatives?

A. It was an error in preparing the papers—no doubt, it was an error.

(Testimony of W. Lyle Borst.)

Q. And you alleged the error?

A. Alleged the error in drawing the specifications. No doubt that was done by parties other than Cory, Joslin, although they did have to approve—and they did, no doubt, approve them in effect.

Q. That is your conclusion. Maybe I asked for it.

A. I felt that he approved it in that he was satisfied with it and tendered it with his request for bids.

Q. You don't contend that Mr. Joslin, or anybody in his organization, made the mistake?

A. No; I don't contend that. I don't feel that it was something definite that they were a party to.

Q. But you do contend that you didn't—you do contend that any reasonable diligence on your part from June 17th to July 8th would not have disclosed any shortage in material? [525]

A. I truly feel that, and I can state definitely that all diligence was given to it by myself and by my people, my direct subordinates, and it would have been physically impossible to have made any determination unless one would have employed fifty men and worked night and day for the period that we were there prior to making the bid, to become aware of the situation with respect to the missing tubes.

Q. You testify, do you, Mr. Borst, that you used all possible diligence? A. Yes, sir.

Q. I believe you testified that you took two men and worked a part of two days. Do you consider that as being all possible diligence.

(Testimony of W. Lyle Borst.)

A. Yes, sir; I feel that we made a summary of the situation as comprehensive as could have been made, unless one had started in before making the bid to make a count by count check, and that would have meant re-stacking and checking hundreds of tons of material from one spot to another, because the type of material we were dealing with at that place and at that time was piled in tiers and stacks and layers, and to make a determination of that kind it would have been necessary to unpile all of this great mass of material to get to the bottom.

Q. And yet you were bidding on this project under these specifications that you had to make a complete physical check [526] of the materials?

A. That physical check was for the determination of the status of the work.

Q. I am not talking of the status of the work, or the material. I am talking about the physical check; before you made your bid you were to make a physical check and to see what the situation was?

A. Yes, it was necessary for the contractor to determine the status of completion of power house No. 1 so that he could then compute the cost of the work necessary to complete it, by observation of the uncompleted work, and by seeing the status of the power house and by further observing the appearance of the plant itself in its finality as shown by the plan. I think it was Plan No. 3.

Q. This proposed statement of facts which was furnished by counsel, I believe you went over that and you are familiar with it?

(Testimony of W. Lyle Borst.)

A. Yes, sir; I am.

Q. And that states that the plaintiff was required to make a physical inspection before making his bid?

A. That is correct, and we did that.

Q. Now, in this proposed statement of facts, counsel states that by July 26th plaintiff had progressed to the point in the preparation of the field inventory where it appeared certain that there was a major shortage of materials, tubes and headers, [528] that would delay the progress of the work beyond the contract schedule of one hundred twenty days. That is when you first became certain of these shortages?

A. No, sir; I was certain of that by reason of advice from Major Matthews, which was confirmed by everyone down the line.

Mr. Scholz: I think the Court will take notice that "everyone down the line" does not mean anything.

Q. Was it on July 26th that you first notified the defendant of the shortage of tubes and headers? I think that was your Exhibit No. 4, but I am not certain of that.

A. I have a letter, as I remember, in which I pointed out the status of the missing tubes.

Q. That was July 26th, is that correct?

A. I believe so.

Q. And that was in the nature of a requisition for tubes and headers, was it?

A. That was in the nature of a general state-

(Testimony of W. Lyle Borst.)

ment which dealt with the necessity of having the tubes and headers delivered in order to complete the work.

Q. Now, was it—strike that, please. Mr. Borst, it wasn't until August the eighth that you submitted to the defendant a letter which requested that the contract be modified to permit you recourse for any damages that you could prove; is that correct?

Mr. Watts: That was on August the third.

Q. (Mr. Scholz, continuing): I refer to the proposed amendments to the contract,—to this contract, reserving full right to claims for extensions of time, and for reimbursement of such increased costs as may be occasioned by non-availability of the above mentioned materials, referring to the water-wall tubes. A. That is right.

Q. That is the first requested change in the contract, that is, a request for a change in the wording of the contract?

A. We had requested adjustment prior to that time.

Q. But this is the first requested change for the wording of the contract? A. Yes, sir.

Q. And you did that because you felt that under the contract and specifications you could not have any recourse for damages?

A. We were conscious of the writing in the basic specifications, but on realization of the vital materials being short, we endeavored to get the contract negotiated in a satisfactory manner and form before final signature.

(Testimony of W. Lyle Borst.)

Q. This request of August 8th was denied by the defendant? A. That is right.

Q. On August 22nd, I believe you wrote to the defendant, I think your Exhibit No. 16, asking for a claim of reimbursement [529] for increased costs, or an interpretation of the contract allowing an increase in the subcontractor's costs because of delay in delivery of materials,—the subparagraph in the letter is as follows: "An increase in the subcontractor's cost because of delay in delivery of materials, he prosecutes the work without due regard to economy in order to complete as early as possible, or an increase of the period of construction beyond one hundred twenty days for the reason of delayed delivery of materials." Now, you wanted to know if you could do that?

A. That was one of the steps we took, yes, sir.

Q. You asked the defendant to write such a letter? A. Yes.

Q. And the defendant refused to write such a letter? A. That's right.

Q. You did not lose any money on this contract, Mr. Borst?

Mr. Watts: That is objected to as not an issue in this case,—no; I will withdraw the objection, but I do object to the form of the question for the reason that it calls for the fact as to whether there was any profit, and the Court is not concerned with how much we made, or whether we made a profit at all. The question is how much we were damaged, what is the difference between what it would [530] have

(Testimony of W. Lyle Borst.)

cost us if it were performed normally, and what it did cost us.

The Court: The objection is sustained.

Q. (Mr. Scholz, continuing): Now, speaking of damages again, you admit that you are not entitled to damages under this contract except that as provided for in the clause which is appended to the signature page of the contract; is that correct?

A. That would impress the damages of which we are talking.

Q. And if that does not provide for damages you are not entitled to any?

Mr. Watts: That question calls for an answer which would invade the province of the Court.

The Court: I think it is a matter for the Court, in fact, I think this case could, and possibly should have been submitted, on a stipulation of facts, and could have possibly been submitted in about thirty minutes.

Mr. Watts: I did submit a stipulation of facts.

Mr. Scholz: That was practically a stipulation of judgment.

The Court: We are not gaining any time by these remarks or arguments. You gentlemen may proceed.

Q. (Mr. Scholz, continuing): Did you agree to confer any benefit on the defendant, or any one else beside the plaintiff, [531] by that clause which is appended to the signature page of the contract?

Mr. Watts: Objected to as calling for a conclusion of this witness.

(Testimony of W. Lyle Borst.)

The Court: He may answer.

A. The clause was placed on there, Mr. Scholz.

Q. Will you answer my question. Do you recall what it was?

A. Will you repeat it?

Q. Did you confer any benefit, or agree to confer any benefit, on the defendant, or anyone else because of this clause,—by addition of this clause to the contract?

A. Yes, by going forward with the execution of the contract.

Q. The only benefit that you conferred, or agreed to confer, by this addition was going on with the contract?

A. And further, by setting down the pattern by which final adjustment could be made to the contract.

Q. As a matter of fact, at the time of the appending of that clause to the signature page, you had completed practically fifty per cent of the work,—let's be exact in this,—I think it was forty-two per cent of the work?

A. Well, that would show on the progress chart. I don't remember that, exactly. [532]

Q. Well, what is shown on the progress chart, or the construction chart?

A. I referred to the weekly chart which charts the progress of the work.

Q. Will you refer to whatever chart you have there and tell me if it is not true that forty-two per cent of the work was completed at that time?

Mr. Watts: What date do you want?

(Testimony of W. Lyle Borst.)

Mr. Scholz: September fourth.

A. We would at that time be thirty-four per cent complete. That is on September fourth.

Q. (Mr. Scholz, continuing): Now, on September 13th, what per cent was completed?

A. About thirty-nine per cent.

Q. Now then, Mr. Borst, as I understand it, at the time you received your order to proceed you had not signed the contract?

A. The formal signing of the contract was on September 13th,—no; I think September 11th.

Mr. Watts: That is the date it was approved.

Q. (Mr. Scholz, continuing): That is, by the contracting officer?

A. That was the final execution date.

Q. You proceeded with the work up to that time? [533]

A. Yes, sir.

Q. And then, of course, you continued after it was signed until you finished it?

A. That is right.

Q. Now, on June 30th, 1945, as I recall it, you claimed under the contract only \$10,008.70 damages; is that correct?

A. That is right; yes.

Q. And then,—prior to that time, on February 21st, 1945, you claimed, under the contract, \$9,323.02 damages, of which ten per cent was profit?

A. That is right.

Q. You don't claim a loss of profit any more?

A. No; we are not carrying that.

Q. Now, Mr. Borst, when your bid was accepted that eliminated all of the other bidders?

(Testimony of W. Lyle Borst.)

A. I don't know, sir.

Q. I think you testified that you had a great deal of experience in contracting work,—with contracts of this kind,—you had twenty similar contracts in various states, is that correct?

A. At this time, or previous?

Q. Just previous to this time?

A. Yes, we would have had more than twenty in the company.

Q. Similar contracts? [534]

A. Yes, previous to that time.

Q. Mr. Joslin supplied everything as far as you know; everything as fast as he could and expedited everything to the best of his ability, did he not, after you filed your requisition for the same?

A. I would say yes, that all of the material in the classification of general supplies was furnished us in approved fashion, and in order, that is, in the nature of missing bolts, gaskets, valves, pipes and fittings. I do not know what diligence there was on his part relative to obtaining other materials which were not supplied in time.

Q. What do you mean by "other material?"

A. Well, tubes and headers, or the replacement of tubes and headers, as well.

Q. Mr. Borst, when you filed your bid I think you stated that you didn't know whether the tubes and headers were there?

A. Well, we were not aware at the time we filed our bid that they were missing.

Q. You didn't know whether they were, or were not?

(Testimony of W. Lyle Borst.)

A. We were fully under the impression that they were there.

Q. You were under that impression?

A. Our understanding was that they were there.

The Court: Just state whether you knew whether they were, or were not. [535]

A. When we made our bid, I knew that there was material of a minor character that was missing.

The Court: It seems to me that we have spent much time and have page after page of record here as to the bolts and nuts and pipes. Now, why cannot this be confined to the shortage of tubes and headers?

Q. (Mr. Scholz, continuing): Do you know whether the tubes and headers were there, or not, before you made the bid? Now, that is a simple question.

A. I knew that the boiler tubes, as a whole, and headers and drums, as a whole, were there, but I didn't know that there were some specific items missing.

Q. The defendant at no time represented to you that the tubes and headers were, or were not, there?

A. Not prior to the letting.

Q. I didn't say that. My question was: The defendant at no time represented to you that the tubes and headers were, or were not, there?

A. The defendant agreed shortly after the award that these tubes were not there.

Q. You have reference, by that statement, to the time that Major Matthews told you that he thought

(Testimony of W. Lyle Borst.)

they were missing, and you talked to Mr. Wedlick?

A. Yes, sir. [536]

Q. Did he say that he agreed they were missing? A. Yes; he did.

Q. Do you recall what words he used?

A. Mr. Wedlick and I talked about it, and he said, "I now understand that these materials were not delivered by the Hercules people, and were not on the site."

Q. He obtained that understanding from what you told him?

A. No; I don't think so. He obtained the understanding because it became common knowledge, and he checked for himself through channels to verify the situation.

Q. Those tubes run from three to forty feet in length? A. About forty feet long.

Q. Now, Mr. Borst, this letter referring to the chain of command that the A.-E.-M. wrote to you, the letter is dated July 19th, 1944, written to the Power Service Corporation, attention Mr. W. Lyle Borst, Chief Engineer, and that was offered in evidence.

Mr. Watts: That has not been offered in evidence, Mr. Scholz.

Mr. Scholz: You offered it in evidence as a part of Colonel Taylor's deposition.

Mr. Watts: Of course, I have no objection to your reading it, if you care to. [537]

Mr. Scholz: Very well.

Q. (Mr. Scholz, continuing:) Do you want to

(Testimony of W. Lyle Borst.)

look at a copy? It is a letter dated July 19th, 1944, and I will read it:

“July 19th, 1944

“Power Service Corporation,
Sunflower Ordnance Works,
DeSoto, Kansas.

Attention: Mr. W. Lyle Borst, Chief Engineer.”

The subject of this letter is the contract that is under discussion here.

“Gentlemen:

“This is to advise that the following procedure will be set up to handle your lump sum contract No. 5 under Cory, Joslin & Macnsons:

“1. Cory-Joslin will be responsible for expediting the delivery of all materials in connection with your work.

“2. Cory-Joslin will have charge of the coordination of your work with other crafts.

“3. The Engineering Division of LBG will have charge of the inspection of all work under your contract and will over-see all tests.

“4. The Combustion Engineering Company representatives and representatives of the Hercules Powder Company [538] will issue all instructions to you through the Engineering Division of LBG only.

“5. All changes from drawings or specifications and engineering decisions that may be necessary from time to time will be made by the Engineering Division of LBG. All changes are to be prepared on standard change order form or work order form properly signed by the Resident Engineer.

(Testimony of W. Lyle Borst.)

“6. All drawings used in the construction of your work shall be properly signed by the Chief Engineer of LBG and the Office of Resident Engineer.

“7. All welders employed on high pressure work are to be approved by Cory-Joslin.

“These instructions are being sent you in order that you may understand whom you should contact for decisions on the work. Mr. Ralph Jung will represent Cory-Joslin on your work. Mr. D. C. Smith will represent the Engineering Division in all matters that concern inspection or engineering decisions to be made. It is to be strictly understood that all authority for changes of construction must be signed by the Office of the Resident Engineer.

“Yours very truly,

“WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON,
“Engineering Division.

“By J. S. HAGAN,
“Chief Engineer.”

Now, you received that letter?

A. Yes.

Q. Now, that letter set out the only connection you had with anybody else in regard to this work, outside of Cory-Joslin.

A. It set out the position of the parties.

Q. And everything else not specifically mentioned, you went direct to Joslin with; is that right?

A. Yes.

(Testimony of W. Lyle Borst.)

Q. Can you point out in that letter any authority which they had to change,—to change the responsibility of Mr. Joslin in regard to this suit?

A. No; I don't think that changes the responsibility of Mr. Joslin.

The Court: I think we will recess at this time for fifteen minutes.

March 25th, 1947, 3:00 p.m.

Q. (Mr. Scholz, continuing): Did you request any extension of time due to the shortage of tubes or boilers?

A. We advised the defendant that we would not be able to complete within the time specified.

Q. Did you ever request an extension of time to complete [540] the contract because of the shortages?

A. We outlined a request for additional time on the tenth of November, the day that we were to have normally been completed with the work. We stated that it was not done with any idea of waiving our position in the matter,—that we did not waive any rights we had for additional compensation due to delays.

Q. Did you ever request any additional time other than that which you stated there in which you stated that you did not waive any possible rights you might have had?

A. We advised them of the delay and told them of our situation; yes.

Q. Referring to your Exhibit No. 15, you made formal requisition dated August the 22nd, 1944, to the defendant for new headers, did you not?

(Testimony of W. Lyle Borst.)

Mr. Watts: What is the date of that?

Mr. Scholz: August 22nd, 1944. I think it was plaintiff's Exhibit No. 15.

A. I formally confirmed my requisition in writing to Cory-Joslin.

Q. (Mr. Scholz, continuing): Now, referring to plaintiff's Exhibit No. 46, which is dated March 18th, 1946, and states,—it is addressed to the Power Service Corporation, 711 Wesley Temple Building, Minneapolis, Minnesota: "Final payment on sub-contract F. F. No. 5 to Government contract [541] No. W-461-Eng.-10274, \$1,000.00.

"Payment in full exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision.

"POWER SERVICE CORPORATION,
By P. C. GAFFNEY,
Treasurer."

You accepted that payment, did you not?

A. I did not write that letter.

Q. It is signed by P. C. Gaffney,—

Mr. Watts: We admit that it was accepted and signed by the plaintiff corporation, and that it is binding upon the plaintiff corporation.

The Court: Very well. Now, we can go ahead. They have admitted that it is binding upon the plaintiff corporation.

Q. (Mr. Scholz, continuing): At that time you had filed a claim which was sent to the Chief of Engineers? A. Yes, sir.

Q. That was the claim for \$10,008.32?

(Testimony of W. Lyle Borst.)

A. That is right.

Q. That was the claim which was outstanding?

A. Yes, sir.

Q. And no other claim?

A. There was no other claim. [542]

Q. You accepted this payment in full of all claims, except the claim in that sum; is that correct?

A. The intent was—

Q. (Interposing:) I think you should answer that question, Mr. Borst.

A. Yes; we accepted the check as final payment as coming forward on the basic contract after the modification. However, it was not the intention to waive any claim that we had.

Q. When you accepted that you stated that it was payment in full exclusive of the outstanding claim of the Power Service Corporation which was submitted to the Chief of Engineers, the claim which, as I understand it, was for \$10,008.32, and is the claim which you have referred to?

A. That is the claim which was submitted to the Chief Engineer; yes, sir.

Q. Where does that state there is any other claim? Can you show me where it states any other claim?

A. No; this has reference to the one claim.

Q. You mentioned, Mr. Borst, that you are asking for damages for being there ninety days?

(Testimony of W. Lyle Borst.)

A. For myself.

Q. You are the only one that had authority to sign any change orders on behalf of the Power Service Corporation?

A. Yes; it was established, as I remember it, that I had the power of attorney for that purpose.

Q. You are the only one there that had that power—was anybody else at the site there who had power to obligate the Power Service Corporation on change orders?

A. I think Mr. Nelson executed one in the very last of the job.

Q. I am sorry—I didn't quite understand that?

A. Mr. Nelson executed one.

Q. One of the change orders?

A. A work order, or a change order.

Q. Did he have authority to execute change orders?

A. I don't know whether he had power of attorney, or not.

Q. I am asking, of your own knowledge, you are the only one that had power to obligate the plaintiff on any change orders? Do you know of anybody else who had such authority?

A. Mr. Nelson would be in that position.

Q. He had the power to obligate the plaintiff?

A. He had the same power I did from the company.

Q. Now, what was the last date of the change order?

A. It was—I don't just recall.

(Testimony of W. Lyle Borst.)

Q. The 16th of December, 1944?

A. About that time; yes.

Q. That was the date, Mr. Borst, according to what I have here—the sixteenth of December, 1944, but was issued [544] later than that, wasn't it?

A. Yes.

Q. Who signed that change order for the plaintiff?

A. As I remember it, Mr. Nelson did sign a proposal or change order for a sum of money dealing with the very last piece of work that was brought up as a change.

Q. I cannot seem to find any change order—have you anything to show that Mr. Nelson had authority to obligate the plaintiff in this matter?

A. No; except his regular, normal authority from the company. He signed all checks.

Q. And do you recall the date that you made requisition for tubes?

A. Written requisition?

Q. Yes.

A. I would have to go back to the exhibits.

Q. I think it was on August 22nd. Now, referring to the damages, did you have a large turn-over on that job?

A. Not to any marked degree.

Q. That does not mean anything to me.

A. Well, I would say no.

Q. What percentage did you have of turn-over?

A. I have not made any exact calculation, but

(Testimony of W. Lyle Borst.)

perhaps twenty to thirty per cent of the men were not there all of the time. [545]

Q. That is your turn-over of labor on the whole job? A. Yes.

Q. What was the turn-over in boiler men? You are alleging damages, and you said that when you stopped work you lost laborers. That is why I asked.

A. Well, the same ratio would hold true for all classes of men, mechanics, boilermakers and all.

The Court: What was the general turn-over on other contracts during the war period? Did you have any ratio, or any fixed amount that you figured as turn-over?

A. We had one contract which happened to be on a ship building job, and the rate was higher there. That contract had probably fifty per cent, but they were not getting the kind of money that they could other places, and they would just stay until they got something else.

The Court: What was the figure that was about normal during this period of time?

A. It would be about thirty or forty per cent, in my opinion.

Q. (Mr. Scholz, continuing:) My notes show that the first time that you claim that the defendant had breached his contract was on September 7th, 1945, in a letter which was not addressed to the defendant?

A. That is one of the documents in which we put in that term.[546]

(Testimony of W. Lyle Borst.)

Q. Did you ever claim any breach of contract before September 7th, 1945?

A. In fact, we did. That was our whole thinking. We had not received the tubes in time—

Q. (Interposing:) And you wrote letters that you had not received the tubes and the headers, I know that, but did you make claim to the defendant for damages by reason of breach of contract?

A. We didn't put it in those words. We said—

Q. (Interposing:) Yes, I know the tubes were missing.

A. And we asked for remuneration and damages.

Q. But that was denied? A. Yes.

Mr. Scholz: I believe that is all.

Cross Examination

By Mr. Gibson:

Q. As I understand it, Mr. Borst, when you came down you brought Mr. Nelson with you because he was one of the oldest employees of the corporation? A. Yes, sir.

Q. And during your absence Mr. Nelson would be the next man to succeed you in representing the plaintiff corporation in the supervisory work?

A. He was the superintendent. [547]

Q. He was the next in rank of importance in the staff of men that you had at Sunflower?

A. Yes; he was, in effect, but as far as handling the work was concerned, he was the superintendent.

Q. He was the superintendent, and you actually

(Testimony of W. Lyle Borst.)

were the project manager. Would you say that was correct?

A. I was still acting in my own capacity as Chief Engineer, and doing the best I could to work this through.

Q. So that you came down here when you were notified that you had gotten the bid—that you were successful, and when you came to Sunflower the thought was by you and the officers of the corporation that during your absence from the project Mr. Nelson would take over?

A. During the time I was there he was in actual charge.

Q. And during your absence from Sunflower who would be in charge of this contract on behalf of the Power Service Corporation?

A. Mr. Nelson.

Q. And that was the thought you had at the time you took Mr. Nelson down? A. Yes.

Q. He went down there immediately following the notice that you were the low bidder, when you went down about the eleventh or twelfth, or thirteenth, of July? [548]

A. Yes, sir.

Q. My impression was that you came by automobile, was he with you? A. Yes, sir.

Q. You came down first to bid on this job, and to look it over in compliance with a telephone request. Did you bring Mr. Nelson with you at that time? A. No, sir.

Q. You did come down in reply to a request?

A. Yes.

(Testimony of W. Lyle Borst.)

Q. Two gentlemen came with you, one was Mr. Brockhoff, I believe? A. Yes, sir.

Q. And the other I think you said was Mr. Forkey? A. Yes, sir.

Q. Were these gentlemen engineers?

A. They are registered engineers, graduated and registered in the state of Minnesota.

Q. They were the ones that assisted you in compiling the data from which you finally submitted that bid? A. That is correct.

Q. Now, back at the home office, what does the office force consist of back there? Mr. Fegels is the president, I understand? [549]

A. That is right.

Q. And who is next in command?

A. Mr. Conkey.

Q. And another gentleman, I believe, was Mr. Gaffney? A. He is the treasurer.

Q. Who is the secretary?

A. A. R. Howard.

Q. Is that a lady, or a man?

A. That is a lady.

Q. Does she put in her time at the office?

A. Yes, sir.

Q. At the home office? A. Yes, sir.

Q. And what clerical office force did you have in 1944 in the home office?

A. Well, both Mr. Forkey and Mr. Brockhoff were there.

Q. They were engineers? A. Yes, sir.

Q. Are they full time employees?

(Testimony of W. Lyle Borst.)

A. Yes, sir, of long standing, of some twelve years—ten years at that time, and under them was a regular crew of draftsmen and junior engineers, of which there would have been about three at that time.

Q. Three junior engineers? [550]

A. Engineers and draftsmen.

Q. Did you have clerical help?

A. Yes; we did have a stenographic force.

Q. How many did you have?

A. There were two girls in addition to Miss Howard.

Q. Who took care of the books of the company?

A. Mr. Gaffney.

Q. Is it Miss, or Mrs. Howard?

A. Miss Howard.

Q. Was she the girl in charge of the office, and over these other two young girls?

A. That is right.

Q. Chief clerk in the office?

A. Secretary of the company — she had been there for some years.

Q. Now, the people that you have mentioned, plus the junior engineers, are they full time employees, and were they in 1944? A. Yes, sir.

Q. And the two girls? A. Yes, sir.

Q. Does that compose the entire office force?

A. As of that time, as nearly as I can remember.

Q. Does Mr. Fegels put in any amount of his time in working [551] on these problems that you solicit and put through?

(Testimony of W. Lyle Borst.)

A. No; he is retired. His residence is in the state of Texas.

Q. He put in a little time in the office—I think you mentioned that he came to the plant?

A. Yes; he did come to the plant.

Q. Now, Mr. Conkey, does he put his time in at the office or the plant? A. Yes, sir.

Q. Is his time taken up with the power Service Corporation, or the Fegels Construction company work? A. With both.

Q. Mr. Gaffney—how is his time devoted?

A. About fifty-fifty.

Q. Would the — with the Fegels Construction Company and the Power Service Corporation?

A. Yes.

Q. Is the Fegels Construction Company, as to a point of size and the work they do—how does their work compare with that of the Power Service Corporation?

A. They are considerably larger.

Q. Both the Power Service Corporation and the Fegels Construction Company, do they occupy the same office, or the same quarters? [552]

A. With the exception of the drafting room. It is entirely removed.

Q. There was just not room enough in the building, is that the case? A. That is right.

Q. And you had to move to some other building?

A. Yes, sir.

Q. Do you know the salary paid to Mr. Fegels for his service to the Power Service Corporation in 1944?

(Testimony of W. Lyle Borst.)

A. I don't know whether the statement shows that definitely.

Q. No; the statement you submitted does not, but I thought that you would know what his salary was in the Power Service Corporation.

A. I think that I do know, but I would not be able to make a sworn statement as to that fact.

Q. What is your best judgment? What is the best statement that you could make?

A. I would say twenty thousand a year.

Q. And how about Mr. Conkey—I am talking now about the salaries in the Power Service Corporation.

A. Yes.

Q. He also gets a salary from the Fegels Construction Company, does he?

A. Yes. [553]

Q. Now, how about Mr. Conkey?

A. Well, with the same background to my answer, it would be about ten thousand a year.

Q. He puts in most of his time in the Power Service Corporation?

A. No; with the Fegels Construction Company.

Q. Most of his time is put in with the Fegels Construction Company?

A. Well, that is probably not an absolutely a fair statement.

Q. Well, his activities are divided between the two companies?

A. Yes; that is right.

Q. And the bigger volume of business is with the Fegels Construction?

A. Yes, sir.

Q. How about Mr. Gaffney, do you know what his salary is?

A. I think four thousand.

(Testimony of W. Lyle Borst.)

Q. From the Power Service Corporation?

A. Yes; I think four thousand a year.

Q. You don't know what he gets from the Construction Company?

A. I may be in error in that, but I would say that it would be about six thousand. His entire salary, I would say. I may be in error with respect to this salary, however. [554]

Q. And in addition to this, you have a retirement program in the office, and there is some seven thousand dollars set aside by the corporation. Is that in payment of some sort of blanket insurance for everybody in the office, and is it paid into an insurance fund that gives you a sum of money after a period of years?

A. I think it is the John Hancock Company that has the insurance—anyway, I think this is paid to the beneficiary on the death of the employee, as well as certain sums of money.

Q. Do you, as well as other employees, share in that? A. Yes, I participate in it.

Q. The seven thousand dollars, or whatever the figure is, is paid by the corporation?

A. Yes, sir.

Q. And then you pay in certain sums of money?

A. No, sir; that is all by the corporation.

Q. That is all by the corporation? A. Yes.

Q. Under this authorization—strike that, please. Under this contract the Government wanted someone to be at the site to sign change orders, work orders and to act on behalf of the Power Service Corporation at all times? [555]

(Testimony of W. Lyle Borst.)

A. That is correct.

Q. In connection with that, immediately upon your having been selected as the lucky company for this contract, you were given—by that, I mean your corporation, your corporation was required to supply the name of someone and they designated you for that position? A. Yes, sir.

Q. I call your attention to the power of attorney which you mentioned, which is dated July 11th, 1944, do you recognize that? A. Yes, I do.

Mr. Gibson: I offer it in evidence as Defendant's Exhibit "A".

Mr. Watts: I have no objection.

The Court: It may be admitted.

(Whereupon document referred to was marked Defendant's Exhibit "A" for identification and admitted in evidence.)

Mr. Gibson: I will read it.

"July 11th, 1944.

"POWER OF ATTORNEY

"I, D. B. Fegles, President of the Power Service Corporation do hereby certify that the following is a true and exact copy of excerpts from the minutes of [556] a special meeting of the directors of Power Service Corporation, held at 711 Wesley Temple Building, Minneapolis, Minnesota, at ten o'clock in the morning of July 11th, 1944.

"It was stated by Mr. Fegles that the purpose of the meeting was to authorize a representative of the company to act for the company at the site

(Testimony of W. Lyle Borst.)

in the acceptance of, or signing of, change orders, and payment estimates, and negotiate price changes, in connection with the prosecution of Subcontract No. 5 to F.F. Construction Subcontract No. 5, principal contract No. W-461-Eng-10274, Power House No. 1 at Sunflower Ordnance Works, Kansas City, Missouri.

“After discussion it was moved, seconded, and carried that W. Lyle Borst, Chief Engineer, be so authorized and that his signature on such above listed documents be binding upon the corporation.

“Carried.”

This is signed “D. B. Fegles, President, and is subscribed and sworn to before a Notary Public. This is his signature is it, Mr. Borst?

A. Yes.

Q. You know that you have to have a similar document so [557] there will be someone in the project to represent any subcontractor?

A. Yes, sir.

Q. And you contemplate that Mr. Nelson, during your absence, would fill in that position and be authorized by the company?

A. Yes, sir.

Q. Why wasn't he authorized at that time, if you contemplated spending only a little time on the job, or wasn't it a fact that you intended to put in your whole time on the job?

A. Well, the paper was made out to me since I was going down there without any definite understanding that I would be there continuously.

Q. But you made the statement asking for nine-

(Testimony of W. Lyle Borst.)

ty days for yourself based on the fact that the contemplation was to put in a very little time there?

A. If we had been able to do it, we would have followed through with a similar document with Mr. Nelson.

Q. Then you did plan on staying all of the time, and then you would get another document—it wasn't your contemplation that you would spend only a part of the time there when your power of attorney was executed on July 11th?

A. That was done just for immediate satisfaction that [558] I was there in that capacity at that time.

Q. Was there ever an authorization similar to that sent to the defendant under your contract to have someone else represent your company?

A. We didn't follow through, in view of my staying on.

Q. At the beginning of your time there at Sunflower, about the first thing you did was to start working on the preparation of the inventory?

A. Yes, sir.

Q. And you discovered immediately the absence of these tubes?

A. As a result of the advice from Major Matthews.

Q. It wasn't until August 22nd that you filed a specific request with the defendant designating by name and describing the items of tubes that you needed and had ascertained were short?

A. That was a confirmation of the fact that we

(Testimony of W. Lyle Borst.)

found them short, and we wanted to be on record to the effect that they were short.

Q. When did you put in the requisition?

A. The requisition was made for these immediately upon the matter becoming common knowledge. I determined the material was on order, and for the moment it seemed to me that that would suffice, and I left it stand at that. [559]

Q. Under the terms of the contract were you not required to immediately make a list and requisition from the defendant who, under his contract, and under the orders of the A-E-M was to supply the material himself, or through others, that is, the materials which you needed?

A. That is true.

Q. In compliance with that, when did you give him the first requisition for boiler tubes?

A. The first requisition, in effect, was put out immediately after the fourteenth, because that is when this whole thing became known, and the request was therefore made in effect.

Q. When you say "in effect" you mean that you notified them that there was some tubes short? You didn't notify them whether there were tubes that were three feet long, twenty-five feet, or forty feet long, missing, whether they had fins on—now, Mr. Borst, don't they each have a number to identify them?

A. That is right.

Q. Did you make such a request on the 14th of July when you found there were tubes missing?

A. No; I found out that the material was short,

(Testimony of W. Lyle Borst.)

and the fact was known to all of the agents, that it was short, and therefore it seemed to me that the situation was well known at the moment, and it seemed the natural thing that it would be coming forward as a result of the orders which were on file [560] for the material.

Q. Did you ascertain with reference to that that the tubes that you were talking about were all of the tubes that you needed for the job?

A. We ascertained that these tubes were the tubes that were missing at that time.

Q. From whom did you ascertain that information?

A. From the Combustion Engineering Company's representative, Mr. Bennett.

Q. Did you see the list of the tubes that they were trying to procure?

A. I saw the list that he had in his files, that he brought on the job, and I discussed it, and I made certain about it, and said that these were the tubes that we were needing, and I saw that they were forthcoming, or was so advised.

Q. How did you know that these were the tubes that you needed when you had not completed your inventory, which would give you the tubes on hand—as a matter of fact, you knew only that some tubes were ordered, and you assumed that those were the tubes that you needed; isn't that the situation?

A. Prior to the time that we wrote the letter putting it down, or listing it, or a confirmation

(Testimony of W. Lyle Borst.)

of the requisition, we had gone through the process of handling the tubes, and doing [561] some cleaning and sorting them out, to the point that I made a definite determination of our requirements.

Q. You remember the testimony read into the record by Mr. Watts from the deposition of D. C. Smith in which he said the tubes were put in stand-by condition, and that they were put in condition for ready assembling; was that his testimony, Mr. Borst?

A. In general, it was. I think that was true, generally. I don't recall the exact wording.

Q. And why did it take you from the 14th of July until the 22nd of August before you could get a list of the tubes you needed? You were able to go and get them from the engineer's office, or elsewhere, and why did you take that length of time?

A. This operation was so effectively covered by the diligence, care and exactness of the Combustion and the Hercules people that it didn't seem necessary.

Q. But to follow the terms of your contract it was?

A. That is right, but it didn't until I finally got the information from Mr. Hagan that perhaps it would be necessary form of record to have on file.

Q. You failed to get the requisition for the tubes in until Mr. Hagan wrote you three or four

(Testimony of W. Lyle Borst.)

times and insisted that you bring this up to date? Your last tubes were not ordered until the ninth of September? [562]

A. The requisition to complete the record as a result of Mr. Hagan asking us.

Q. Don't you know that the defendant Joslin could not take any action to expedite any material unless it was designated or described?

A. I was certainly satisfied that the material was forthcoming, and that he, in turn, through the Hercules people was making an effort to get them.

Q. But by your failure to follow your contract it made it impossible for Mr. Joslin to know what to ask for—because of your failure to have a specific list of the specific items, it was impossible for him to know just what to ask for in order to put the pressure of urgency, or to get the proper officer to act, because you didn't get your list prepared?

A. There was a list established by the Hercules people at the outset.

Q. When did you find out about that list?

A. Within a day or two after my conference with Major Matthews.

Q. Did you get a copy of that list?

A. No, sir.

Q. Did you compare it with your inventory so that you could follow up with a requisition to Mr. Joslin under your contract? [563]

A. No, sir.

Q. Have you the requisition covering all of these materials?

(Testimony of W. Lyle Borst.)

A. Exhibit 20, or 19—I think 20.

Q. As I understood from your testimony previously—I am now holding Exhibit 20—from the testimony you gave at the time this exhibit was offered in evidence I understand, Mr. Borst, that this is a file of your carbon copies of the requisitions for missing material that you made to Cory-Joslin under the terms of your contract?

A. Yes, sir.

Q. It starts out on July 25th, 1944, Material Requisition No. 1, in which you made up a list of some items?

A. That is right.

Q. And on August 19th you finally got to requisition No. 26, and it says, "As a matter of record, we wish to confirm our verbal advice on the shortage of water-wall tubes for boilers No. 1, No. 2 and No. 3. The tubes were found to be short on July 14th, 1944, and the matter discussed with Major Matthews, Captain Overesch, Mr. D. C. Smith of Lozier, Broderick & Gordon, and Mr. Ralph J. Jung of Cory-Joslin & Macnson.

"These tubes to be furnished by Combustion Engineering Company are as follows: Three each F-4R-L 3 inch by two hundred inch furnace tubes," and then there follows a long list of the same things. These were furnace tubes. Later on were there [564] some boiler tubes, the boiler tubes you are complaining of?

A. Water-wall tubes are furnace tubes.

Q. That was the first day you gave your list?

A. That is the formal requisition confirming it.

(Testimony of W. Lyle Borst.)

Q. On September 5th you made a supplemental list?

A. That was for materials found defective.

Q. And that was for water-wall or boiler tubes?

A. I think you are right.

Q. You say that you required some thirty-seven tubes, those were required—this is dated, Mr. Borst, September 1st, 1944, and covers about thirty-four tubes, as I add them up?

A. Those are boiler tubes proper.

Q. Those were replaced, defective tubes?

A. Yes, sir.

Q. You completed the inventory about what date?

A. The major portion of the work was done about September 9th. There were some, however—several additional ones outside of those.

Q. Of the total amount of tubes that were short—there were some seven hundred odd tubes required for the three boilers? A. Yes, sir.

Q. And possibly about one third of them short? That is about 220 or 216? [565]

A. Yes, sir; I think that is right.

Q. If I understand you correctly, those were some of the most important items that you needed first in the construction of this job?

A. They were vital, along about the third step of the work.

Q. Knowing that you could not proceed further you waited from the 14th of June about seven weeks before you made a requisition?

(Testimony of W. Lyle Borst.)

A. Well, my asking for the tubes had been done, and this was a confirmation of the situation, and that part would be only a formal record that the tubes were coming forward.

The Court: You experienced no delay until that time?

A. Yes, I had been delayed in August, but I had gotten some tubes that I had requisitioned by that time.

The Court: I thought your testimony was that August 29th was the first time that you experienced any delay? A. I think August 17th.

The Court: We will adjourn at this time until ten o'clock tomorrow morning.

March 26th, 1947, 10:00 a.m.

Q. (Mr. Gibson, continuing:) Mr. Borst, I am calling your attention now to Exhibit which has been marked 12-A, and I presume it is admitted it is a letter written August 15th, 1944, and signed by Mr. Hagan, on behalf of the A.E.M., and it is directed to you. The subject is "Material shortages."

"Attention: Mr. Borst:

"Subject: Material shortages.

"Gentlemen:

"Receipt is acknowledged of your requisitions numbered one to thirteen, the latter being dated August 11th, 1944. We assume that the above requisitions represent all of the shortages of materials required for completion of your contract on Power

(Testimony of W. Lyle Borst.)

House No. 1, and that the same are the result of a complete inventory made by you in accordance with paragraph 5-04 (b) of your contract.

“If the above requisitions do not cover all of the shortages we should be advised at once of any further material requirements so that the progress of the work will not be delayed. In accordance with the above mentioned paragraph of your contract, a complete inventory was to have been prepared immediately upon starting your work so that shortages could be determined. [567]

Yours very truly,

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON,
J. S. HAGAN.”

You remember receiving that letter?

A. Yes, sir.

Q. I call your attention to a letter from you to the A.-E.-M., attention; Mr. Hagan, and that is dated August 16th, 1944, in which reference is made to the letter which I just read, which was dated August 15th; is that correct? A. Yes, sir.

Mr. Gibson: At this time I offer this letter in evidence as Defendant's Exhibit, which is next in order. I imagine it is Exhibit “B”.

(Whereupon document referred to was marked Defendant's Exhibit “B” for purposes of identification.

Mr. Watts: We have no objection.

The Court: It may be admitted.

(Testimony of W. Lyle Borst.)

(Whereupon Defendant's Exhibit "B", for identification, was admitted in evidence.)

Mr. Gibson: It is as follows:

"Sunflower Ordnance Works,
August 16th, 1944.

"William S. Lozier, Broderick & Gordon,
Sunflower Ordnance Works, [568]
Box No. 36,
Kansas City, Missouri,

"Attention: Mr. J. S. Hagan, Chief Engineer.

"Gentlemen:

"Reference to your letter of August 15th relative to requisitions for material. We find upon coming on this work that there are no complete lists of materials, bills of materials, or shipping lists available from which to work in preparing our requisitions. These bills of materials would normally have been available. In view of this we find it necessary to make up an entire new list of materials. Preparing this form from the drawings and field observations. This is a major piece of work and is being carried on at this time, and our inventory is checked against this bill of materials. We are endeavoring to complete this requisition as rapidly as possible.

"Yours very truly,

POWER SERVICE CORPORATION,
W. Lyle Borst."

(Testimony of W. Lyle Borst.)

The letter of August 15th which is mentioned is the one that I read previously? A. Yes.

Q. Now that letter, Exhibit B which I just completed reading you sent in reply to the letter of August 15th? A. Yes, sir. [569]

Q. Your contract required that you make an inventory with reference to furnishing material lists, or purchase orders?

A. There was no specific mention of it.

Q. Now then, Mr. Borst, this letter I show you, —I asked you to produce the letter, that is the original letter, and you stated that you didn't have it, but had no objection to this copy?

Mr. Watts: That is right, Mr. Gibson.

Q. (Mr. Gibson, continuing:) I call your attention to a letter of August 19th and ask you if you received the original of that letter?

A. That is right.

Mr. Gibson: I offer this as Defendant's Exhibit, the next number in order.

(Whereupon document referred to was marked Defendant's Exhibit "C" for purposes of identification.)

Mr. Watts: We have no objection.

The Court: It may be admitted, and that is Exhibit "C".

The Clerk: That is right, your Honor.

(Whereupon Defendant's Exhibit "C" for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) This letter is dated August [570] 19th, 1944, and is addressed to the Power Service Corporation, Sunflower Ord-

(Testimony of W. Lyle Borst.)

nance Works, DeSoto, Kansas, Attention, W. Lyle Borst, Chief Engineer. The subject is "Material and Equipment Inventory, Power House No. 1, Building 154-1," and is as follows:

"Gentlemen:

"In your letter of August 16th, 1944, you state that there were no complete lists of materials, bills of materials, or shipping lists available from which to work in preparing your requisitions.

"You were given a list of materials and equipment together with their respective list numbers and purchase order numbers, which had been furnished and delivered on the plant site by the Hercules Powder Company. This list was complete according to the Hercules Powder Company's records. However, it was known that some materials had been borrowed from Power House No. 1 inventory by the Hercules maintenance and operating departments, and others, that there was no definite record of just what materials had been taken. That was one reason for requiring a complete field check of the materials and equipment inventory by the subcontractor.

"There was no detail list available for the Combustion Engineering Company equipment nor for the W. K. Mitchell [571] Company piping.

"Very Truly Yours,

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON."

signed by "J. S. Hagan." Do you remember receiving that letter in connection with this matter?

(Testimony of W. Lyle Borst.)

A. Yes, sir.

The Court: What date is that letter?

Mr. Gibson: August 19th, following the letter written by Borst of August 16th.

Q. (Mr. Gibson, continuing:) In other words, Mr. Hagan called attention to the reason for making the list? A. Yes; that is right.

Mr. Gibson: I am now reading from Exhibit 14-A, which is a letter from the A.-E.-M., signed by Mr. Hagan, Chief Engineer:

“August 22nd, 1944,

“Power Service Corporation,
Sunflower Ordnance Works,
DeSoto, Kansas.

“Attention: W. Lyle Borst, Chief Engineer.

“Subject: Defective boiler tubes.

“Gentlemen:

“We have been advised that in the process of [572] cleaning up boiler tubes for Power House No. 1,—”

Q. (Mr. Gibson, continuing:) Building No. 1, that was the number that was allocated to the power house that is in question here?

A. Yes, sir; that is right.

Q. All the buildings had a number?

A. Yes, sir.

Q. And this building was identified by this “No. 1”, that is Power House No. 1, and building No. 154-1? A. I presume that is true.

Mr. Gibson: I will continue with the letter: “Building No. 154-1, some defective tubes have

(Testimony of W. Lyle Borst.)

been encountered. It is our understanding that the Hercules Powder Company has placed an order for the number of tubes that have been found defective to date, which would cover your present requirements.

“In order that the number of defective tubes that will be required to be replaced in all three boilers can be determined, the remaining tubes that have not been examined at this time should be cleaned up at once so no delay will ensue. Any delay caused by the number of defective tubes not being determined must be absorbed by the Power Service Corporation.

Very truly yours. [573]

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON.”

This indicates a number of copies of this letter sent to the Resident Engineer, R. N. Wheelock, F. V. Wedlick, L. J. Neubauer, Power Service Corporation.

Q. Do you remember receiving that letter?

A. Yes, sir.

Q. Does that not create a little difference in the handling of tubes found short on the inventory as compared with defective material which required replacement, so far as the contractor was concerned?

A. There were tubes determined as being mis-used, or mis-handled upon taking off this grease.

Q. The contract provides that defective material is to be replaced by the contractor?

(Testimony of W. Lyle Borst.)

A. That is right.

Q. Now, with reference to the material that was absent from the plaintiff's inventory, that was to show that which was absent so that a requisition could be put in on it to give Mr. Joslin, or others, an opportunity to procure those items; isn't that right? A. Yes, sir; I think that is right.

Q. I am now referring to the provisions of clause 5-04 (b) of the contract, which clause provides for an inventory [574] of materials to show the shortage, a list of all of the materials, and provides that this shall be complete. Now then, the contract provides that if through carelessness of yours you break any of the materials that you had to replace this at your own expense; is that right? A. Yes, sir.

Q. That point was not raised?

A. No, sir; I think not.

Q. Now, I call your attention to a letter which is dated August 26th, addressed to the Power Service Corporation for the attention of Mr. W. Lyle Borst. The subject is "Inventory," and it is signed by Mr. Hagan for the A.-E.-M.

Mr. Gibson: I offer it as Defendant's Exhibit "D".

(Whereupon document referred to was marked Defendant's Exhibit "D" for identification.)

Mr. Watts: No objection.

The Court: It may be admitted.

(Testimony of W. Lyle Borst.)

(Whereupon Defendant's Exhibit "D" so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Do you remember receiving the original of this letter, Mr. Borst?

A. Yes, sir.

Mr. Gibson: The letter is as follows:

“Gentlemen:

“To date we have thirty-three of your requisitions [575] listing shortages of material that is to be furnished you under your contract. The last requisition is dated August 23rd.

“In order that all shortages may be determined in sufficient time that the required materials may be placed at your disposal it is imperative that your inventory be completed at the earliest possible date as required by paragraph 5-04 (b) of your contract.

“If this inventory has not been completed to date, we request that the same be completed at once and a list of all material shortages be in our hands on or before September 9th, 1944.

Very truly yours,

WM. S. LOZIER, INC., BRODERICK
& GORDON.”

That is signed by Mr. Hagan.

Q. Do you remember receiving that letter?

A. Yes, sir.

Q. After you were on this job for a while, Mr. Borst, did you receive a letter in which you were

(Testimony of W. Lyle Borst.)

instructed,—Strike that, please, Mr. Reporter. Did you get the inventory completed by September 9th, 1944?

A. All the basic material was established by that date; yes, sir. [576]

Q. When you say “basic material,” you mean material necessary to complete that part of the contract?

A. Well, there was this fact, that in the final windup we found some items in the nature of certain appurtenances and a certain piece of machinery,—for example, we will take the soot blower, which was a particular device in this job, and in going over the material on the floor there we would count all of the elements and parts required actually going into this device, but when it came to actually putting it up we would find possibly some little casting was missing, and, as I say, in winding up these jobs, that would be the result,—some little casting would be missing which did not show up before, or which we thought were there in sufficient quantities, and in cases of this kind it would be determined that there was a shortage. Now, that was the type of equipment that might show up after that time.

Q. I have a letter here, Mr. Borst, which has been marked as Defendant’s Exhibit “E” for identification. It is dated August 31st, 1944, and is from the Power Service Corporation, signed by W. Lyle Borst, addressed to Lozier, Broderick & Gordon, Sunflower Ordnance Plant, Kansas City,

(Testimony of W. Lyle Borst.)

Missouri, for the attention of Mr. Hagan. The subject is "Defective Boiler Tubes." Is that your signature on that letter? A. Yes. [577]

(Whereupon document referred to was marked Defendant's Exhibit "E", for purposes of identification.)

Mr. Gibson: We offer it in evidence as Defendant's Exhibit "E".

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "E" so marked for identification, was admitted in evidence.)

Mr. Gibson: This letter is as follows:

"Gentlemen:

"Reference to your letter of August 22nd regarding the checking of boiler tubes, we wish to advise that these tubes have now been checked, and a requisition issued for the deficiency. This operation required considerable more work in the way of cleaning the tubes in order to properly inspect them than would have been necessary from the standpoint of erection only.

Very truly yours,

POWER SERVICE CORPORATION."

Q. Based upon that letter dated August 31st stating that you had requisitioned the material, or the tubes, you mean by that that they were going

(Testimony of W. Lyle Borst.)

on the way. Now, on September 1st certain material was requisitioned, and that was on requisition No. 43, which was dated September 1st. Is that the same,— [578] or are those the same tubes that you refer to in the letter of August 31st?

A. I think that is the exhibit.

Q. Are you sure of that, Mr. Borst?

A. Yes; I am. I might have dictated them one day apart.

Q. In response to a letter from the Chief Engineer, Mr. Hagan, did you ever write a letter stating that you had completed your inventory in response to the directive to get the inventory in by September 9th?

A. I don't remember whether I wrote a letter exactly of that wording, or not.

Q. You continued to send in requisitions clear on up, and possibly beyond, the ninth of September, did you not?

A. Yes; there were some requisitions following that.

Q. As a matter of fact, you sent requisitions,— I think it is Exhibit No. 20,—I think that is the requisition for material,—there is one dated as late as October 12th, which is more than a month after the date given you by the A.-E.-M. That is requisition No. 85?

A. Yes, sir.

Q. So that between the requisition which I read which was dated September 1st, and was requisition No. 43, and between the letter of August 31st and October 12th, you sent in 40 or more requisitions?

(Testimony of W. Lyle Borst.)

tions, almost as many as you had sent in before that time? [579]

A. Yes, sir, and I think those dates are correct as you have stated.

Q. These were for minor items, the requisitions that were sent in between August and October 12th. They were all similar requisitions, that is, for similar materials, except those couple in there for tubes and headers. They covered the type of material as you were ordering in the nature bolts, nuts, gaskets and stuff like that?

A. Yes, sir; similar to that.

Q. Now, in order to clear up a possible doubt, I am calling your attention to a letter of August 17th, 1944. The subject is "Requisitions," and the letter is signed by Mr. Hagan. I will ask you to read it, Mr. Borst, rather than to clutter up the record with it.

A. Yes, sir.

Mr. Gibson: I ask that the Clerk give me a designation on this as Defendant's Exhibit "F".

(Whereupon document referred to was marked Defendant's Exhibit "F" for purposes of identification.)

Mr. Gibson: And I now offer it in evidence.

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "F" so marked for identification, was admitted in evidence.) [580]

Mr. Watts: I have no objection, Mr. Gibson, to

(Testimony of W. Lyle Borst.)

any letter going in the record that was sent between the plaintiff and the A.-E.-M., or between the plaintiff and the contractor, or between the plaintiff and the Government.

Mr. Gibson: I think, perhaps, I should read this letter into the record. It is as follows:

“Gentlemen:

“In the future when you issue a requisition to Cory, Joslin & Macnsons covering any material shortages that may exist, we wish you would send one copy to the office of the Resident Engineer, marked for the attention of R. H. Downing.

“The copy addressed to Lozier, Inc., Broderick & Gordon should be marked for the attention of J. S. Hagan, Chief Engineer.

“It has been requested by the Office of the Resident Engineer that copies of letters concerning matters of a controversial nature be sent to that office marked for the attention of R. H. Downing.

Very truly yours,

WILLIAM S. LOZIER, INC.,
BRODERICK & GORDON.”

That is signed by Mr. Hagan.

Q. (Mr. Gibson, continuing:) Was not the purpose of that [581] to aid in bringing to the attention of the A.-E.-M., which was Mr. Hagan, any shortage so that all speed possible could be exercised in getting those things because this matter had been dragging there at the plant until August 17th? Was not that the purpose?

(Testimony of W. Lyle Borst.)

Mr. Watts: Objected to as being argumentative. I think the Court can determine these questions.

The Court: He may answer.

A. I don't know exactly the purpose, or the objective of the letter, but it was true that the Engineer's Office wished to be kept acquainted with the progress of the work at all times.

Q. Your first requisition was to the defendant, Cory-Joslin, is that not true, Mr. Borst?

A. Yes, sir.

Q. And then Cory-Joslin in turn were supposed to send them to the proper source for procurement, unless they procured the materials themselves?

A. That is right.

Q. And in order to save time in getting to Cory-Joslin, or from Cory-Joslin to the A.-E.-M., and then to some procuring agency involved where the items would be procured at a place perhaps Mr. Joslin didn't know where they were, was it not the purpose of this letter to have the information in the [582] office of the A.-E.-M., to save delay in getting it to the proper department?

A. I am not certain of the purpose of that letter.

Q. Was it explained to you that it was to speed up the production? A. No; it was not.

Q. What was your interpretation of it?

A. Well, I just thought it was a formal record for the A.E.M., and the Government.

Mr. Gibson: I am offering now in the record Defendant's Exhibit "G". It is dated August 19th, 1944.

(Testimony of W. Lyle Borst.)

Q. (Mr. Gibson, continuing:) Did you receive a copy of that letter,—I believe it was read as a part of the deposition by Mr. Watts?

A. Yes; we received it.

Q. You did receive it? A. Yes, sir.

(Whereupon document referred to was marked Defendant's Exhibit "G" for purposes of identification.)

Mr. Gibson: This letter was read yesterday, I believe. It is marked as Exhibit "G" now. It is addressed to the Power Service Corporation for the attention of W. Lyle Borst, and is signed by Mr. Hagan. The subject is the contract that we have been discussing here for these several days. [583] It says:

"Gentlemen:

"This is to advise that the following procedure will be set up to handle your Lump Sum Contract No. 5 under Corey, Joslin & Macnsons," and then subparagraph No. 2 reads:

"Cory-Joslin will have charge of the coordination of your work with other crafts."

And then it goes on,—I think it might be of value in clearing up some of the matters later.

Q. (Mr. Gibson, continuing:) Mr. Borst, a part of your work under contract you asked for permission to sub-let that work to some other concern, did you? A. Yes, sir.

Q. And one of the concerns was A. H. Bennett Company? A. That is correct.

(Testimony of W. Lyle Borst.)

Q. What part of the work did you subcontract to them?

A. The work of installing pipe covering and insulation.

Q. Will you explain that more fully?

A. Of all of this piping, or we will say piping which was carrying steam or water, which carried a temperature above room temperature,—anything over one hundred degrees, there was a coating of material applied,—heat resisting material,—magnesia or rock wool, or something of that nature. [584]

Q. And they did the installing of the pipe covering and the insulation? A. Yes, sir.

Q. They had nothing to do with the brick work?

A. There may have been some phases of the work done by other contractors,—the brick work had nothing to do with the insulation.

Q. That was a separate contractor that did that phase of the work; even though it was a part of this original contract you decided it was better for someone else to do that work?

A. That is common practice to have the work subbed.

Q. How much did you pay them to do that work?

A. I don't remember the exact figure, but I think in the neighborhood of \$30,000.

Q. Can you determine the exact figure on that?

A. I don't think I have the subcontract records here with me.

Q. And your best figure on that now is thirty thousand dollars? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. You had another subcontractor, I believe,—what was that?

A. That was the Northwest Fire Brick Service Company.

Q. What did they do? [585]

A. They installed the brick work in connection with the boiler proper. The brick work being a part of the job that has to do with the housing of the furnace, and the boiler, and the fire inside of the boiler.

Q. What was the amount of that, if you know?

A. I think that was about \$18,000.00.

Q. Do you have a record of that here?

A. No, sir.

Q. Now, as to the work under your contract, you were responsible for the requisitioning of material, any material to complete the work of either the subcontractor Bennett or the Northwestern Fire Brick Service Company? That was the same as your own work? You were responsible for requisitions for that work? A. Yes, sir.

Q. That was a part of your contract?

A. Yes, sir.

Q. Did these subcontractors operate simultaneously with you? A. Yes, sir.

Q. You know that they were still sending in requisitions from the Bennett Company for miscellaneous items,—calling your attention, Mr. Borst, to a letter of November 27th, which was after the date set for your completion of this job, they sent in for material on November 25th; November 22nd,

(Testimony of W. Lyle Borst.)

November [586] 22nd, and November 18th; also on November 9th?

A. I would say, Mr. Gibson, in respect to that, that a good deal of that material resulted in the inspections, or resulted from the procedure for the reason that the exact method of application, the exact thickness, and the exact number of layers were established as the work progressed, and by reason of the inspection of Mr. Neubauer.

Q. Mr. Neubauer occupied,—

A. (Interposing:) I was not quite through with my answer.

Q. I beg your pardon.

A. They were presumed to be on the proper approach to this thing, but then it would be decided during the progress of the work to use more cover, possibly another layer or so.

Q. Mr. Neubauer occupied the position formerly held by D. C. Smith? A. Yes, sir.

Q. And both were employees of the A.-E.-M., and Lozier, Broderick & Gordon, but not of the defendant? A. That is right.

The Court: Is this last work that has been referred to here, work of the subcontractors, is that tied in with the operation of the work which required the water-wall tubes that are under discussion in this suit? [587]

A. It ties in, in this respect, your Honor: The water-wall tubes and the installing of them, and the hydrostatic tests and the putting in of the brick work, which was by the Northwestern Fire Brick

(Testimony of W. Lyle Borst.)

Service Company, and some of the installation done by the Bennett Company, was applied to the exterior of the water-wall and to the boiler proper, so it was done after we got the water-wall up.

Q. (Mr. Gibson, continuing:) I ask you, Mr. Borst, if you received a copy of the letter which informs that as of August 21st, L. J. Neubauer replaces D. C. Smith as engineer?

A. That is right.

Q. Was that about the date he succeeded Mr. Smith?

A. Yes. He had been there at Hercules prior to that time.

Q. Under the contract there was a small amount of material that the contract indicates that you were to pay for?

A. Yes, sir.

Q. I think some cutting oil and welding bars. Have you any record of the total amount of that cost?

A. I don't have it here; no.

Q. What is your best estimate as to what you had to expend in material on this whole contract?

A. I don't have it in my mind at this time, but in thinking back, I would say four thousand to five thousand dollars,—it [588] might have been as much as ten thousand, but for the sake of a figure at the moment, I would lean on the former.

Q. That is under that part of the contract where it says,—clause 5-04, where it says, "Material and supplies incidental to the permanent construction, including but not limited to, cutting oil, wire, fuel for construction equipment, welding bars, and so

(Testimony of W. Lyle Borst.)

on," that is the clause under which you stated that it was between four and five thousand dollars?

A. Just,—that is just a general estimate. I would not be positive as to the amount.

Q. Do you have your labor payrolls here?

A. Yes, sir.

Q. Are you familiar with the payroll situation there, particularly with reference to the boiler-makers?

A. In general; yes.

Q. See if you can answer this from memory, Mr. Borst: This first payroll, after you got under way, you started I believe before the 18th of July, or about that time, and the first payroll was July 23rd,—I think from the 16th of July to the 23rd of July?

A. I think that is correct. It would take a little time to get it exactly, but I can do it if it is necessary. However, I will accept that date.

Q. Then the next payroll was July 30th. You were in [589] the process of building up a crew, including boilermakers, at that time?

A. Yes, sir.

Q. Now, the first tubes that you started to work on, and were delayed on, were some time in August, I believe. You were leading up to the point when you would have a crew available when the furnace tubes would be installed,—or did you start on them?

A. We started on the boiler tubes, and whatever furnace tubes we had there. We did what we could without all of them on the job.

Q. There were approximately four thousand

(Testimony of W. Lyle Borst.)

boiler tubes in connection with that. Does your recollection check with that, that there were four thousand boiler tubes and seven hundred furnace tubes?

A. Furnace tubes are similar to the boiler tubes.

Q. I should say four thousand furnace tubes, and seven hundred water-wall tubes; is that right?

A. Yes.

Q. The construction is different. You can tell them as soon as you see them,—is there any difficulty in saying which is which, Mr. Borst?

A. Well, there is an intermingling of them so that the description would be hard to determine without an exact and careful check. [590]

Q. Water-wall tubes have different purposes. Now, with reference to the furnace tubes, are they not more or less uniform so that one could tell which it was?

A. Yes; each time you set a row they are designated especially.

Q. Instead of delaying you went ahead and worked on as many as you could with the crew that you had?

A. Yes, sir.

Q. Now, calling your attention to August 13th, that was one month after you had signed Notice to Proceed with the work. Do you have any recollection as to how many boiler men you had on the job at that time?

A. That would be on the payroll of August 13th, did you say?

Q. The payroll of August 13th.

(Testimony of W. Lyle Borst.)

A. Forty-eight boilermakers, if that is the date.

Q. Yes; as of that date. Now, that included the boiler superintendent?

A. Yes, sir; but on further analysis we had other operators there, such as the air compressor operator, and hoist operator, a carpenter foreman for the scaffolding, and also men to do the oiling, doing work in connection with the boilers.

Q. I am asking now, Mr. Borst, about the craft designated by the Union as "boilermakers," and "helpers,"—boilermakers and boilermaker helpers?

A. They are the ones I gave the figure of "forty-eight."

Q. Now, do you have a list in front of you?

A. Yes, sir.

Q. Excluding the boilermakers helpers,—I believe you had fourteen helpers on the 13th, did you not?

A. Fourteen.

Q. You had thirty-three boilermakers, including in that thirty-three Mr. Hobbs, Mr. Precht, and Biggs, who were lead men?

A. That is about right.

Q. And with that crew of thirty-three men you followed on through. I believe you had no labor turn-over at all on that job with reference to the boilermakers. You only lost two or three men on that job, and that was because you yourself fired them?

A. I have not made any definite analysis of it.

Q. At that time when this contract was in progress there was a freeze order in effect where men

(Testimony of W. Lyle Borst.)

could not jump their jobs without taking a penalty of sixty days? They could not quit without a release, did they?

A. They did require a release.

Q. They were frozen on the job?

A. Well, that was perfunctorily so.

Q. Will you check your list from that time on and show me [592] if you have more than three or four changes out of that list of thirty-three? You increased your crew to this thirty-three man crew along in October, and I believe you layed off in October twenty-two, and you laid off the balance in December. Now, then, they all stayed on through, and you had this small turn-over; they were on the job regularly; they did not quit?

A. There was some absenteeism.

Q. Did you ever run a job before the war, Mr. Borst, in which you had as little turn-over as you had on this job?

A. So far as turn-over was concerned, I don't think this job is outstanding in that respect.

Q. Did you ever have as little turn-over as you had on this job? A. Yes, I think so.

Q. You worked ten hours a day six days a week?

A. Yes, sir.

Q. One shift?

A. Yes, but some considerable overtime over that number of hours, but basically that is what we worked.

Q. You worked on Saturdays sometimes, six days a week?

(Testimony of W. Lyle Borst.)

A. Yes, sir; and into the night and on Sundays.

Q. Will you tell me if in the entire time that there was more than one Sunday that you had a complete crew,—just one Sunday, possibly a few men once in a while, but one Sunday you [593] had a crew on the job? I think that was on September 3rd.

A. We did work long in the night, and the crew would come early or late.

Q. I am asking you now, Mr. Borst, if you at any time, except on one Sunday, had a crew there on Sunday,—I believe it is the September 3rd payroll, I think the last day,—does the payroll go to Sunday or to Saturday?

A. It goes to Sunday.

Q. It closes on Sunday? A. Yes.

Q. September 3rd was Sunday,—that was the only Sunday you had the organization at work as a crew? There was probably a couple or so working in isolated instances. I haven't check that.

A. No; I have not checked it either.

Q. But don't you know from your own recollection, Mr. Borst, that you didn't have any Sunday work?

A. I know that we worked on some of the work more than one Sunday.

Q. But so far as the boilermakers were concerned, check the September third and November fifth records, and I think the only time you find that they worked was on November fifth and September third, and November fifth lists Precht;

(Testimony of W. Lyle Borst.)

Mecum; Weiles; and Hartigan as having worked. Now, will you see if [594] I am correct on that?

A. What was the date?

Q. November fifth payroll.

A. That week shows Precht, Mecum, Weiles and Hartigan.

Q. No other boilermakers?

A. That is right.

Q. Now, Mr. Borst, would you go through your records on the boilermakers and show me any other instance when you had boilermakers working on Sunday except on the September 3rd payroll, other than the date of November 5th which I called to your attention?

Q. (Mr. Gibson, continuing:) Would it be easier during the lunch time to go through this record, Mr. Borst?

A. Yes; I am sure it would be.

Q. You understand the question?

A. Yes; I think I do.

Q. It was when they worked on Sunday, that is, with reference to the boilermakers. Will you check that? I find also that you only lost four or five men, and that you immediately replaced them, and that you had some thirty odd men [595] that you carried on through the job. Will you check your records and show me if that is correct, or if I am wrong in that?

A. Yes; I will do that.

Q. I call your attention to page 139 of the trial brief in which part of Exhibit No. 65 is set forth.

(Testimony of W. Lyle Borst.)

and that covers the overhead expense. The upper part of the page covers the jobs in progress between November 10th and December 19th by the plaintiff; the first one is the Sunflower Ordnance job,—is the Sunflower payroll for a certain date each week at which the payroll period ends? A. Yes.

Q. I think, if I understand it, it is for a period ending on a specific date, or day, each week?

A. That is right.

Q. And that day is always on Sunday?

A. Yes.

Q. The payroll goes for Monday, Tuesday, Wednesday, Thursday, Friday, Saturday and Sunday? A. Yes, sir.

Q. When did you usually pay?

A. On Tuesday or Wednesday.

Q. And up to the preceding Sunday?

A. Yes. [596]

Q. To midnight? A. Yes, sir.

Q. And the unit of time that you select in this exhibit is the end of certain weeks?

A. Yes, sir; that is right.

The Court: If this is something the Court should have in mind, I am afraid by the time the briefs are in and read, it might be a bit hazy. I think possibly it should be in the record.

Mr. Gibson: I think it is in the record as Exhibit No. 65 of the plaintiff. It covers the period of from November 10th to December 19th.

Mr. Watts: That is right.

Q. (Mr. Gibson, continuing:) You were arriv-

(Testimony of W. Lyle Borst.)

ing at the average number of employees per week for the purpose of arriving at some estimate of the proper allocation of overhead expense during that that thirty-nine day period; is that the purpose of this exhibit?

A. Yes, sir; that is right.

Q. Now, calling your attention to page 139, the first item there under the Sunflower Ordnance Works contract is 11-5,—that is on Exhibit No. 65. Mr. Borst,—11-5 100, what does that mean?

A. That would be the number of employees for that week. [597]

Q. You mean on the November fifth payroll?

A. Yes, sir.

Q. That covers October 29th to November 5th; is that the period of time ending November 5th?

A. That is right.

Q. Is there any doubt about that? A. No.

Q. Opposite that you have one hundred men?

A. Yes, sir.

Q. In computing that how do you put that figure in here, or why do you do that, the figure which goes back to November 5th, that is the week ending November 5th, which is five days before you started on this period for which you ask damages? Why did you go back to October in arriving at the average overhead, more than a complete week before the time you start to compute these damages? Why didn't you start on the 10th? Can you explain why you did that? If we are taking a period of time from the 11th of November to the 19th of Decem-

(Testimony of W. Lyle Borst.)

ber, should not you take the men on the payroll as of the 11th of November, and the number of men on the last day, the 19th of December, and use that as a computation instead of taking the payroll back in October?

A. That may be,—probably is, true.

Q. Isn't that because you had one hundred men at that time, and when you got to November you had dropped down some, or do [598] you have any explanation for that, Mr. Borst?

A. No, sir; I haven't, at the moment.

Q. The next payroll is 11-12, eleven meaning November, the eleventh month, and twelve meaning the Sunday, the 12th of the month. That is the date of the ending of the payroll, November 11th, being Saturday, and that is the date you claim that the extra overhead started,—not on November 10th, because your contract was to be closed, and you would take November 11th as being the proper date to begin the counting of men?

A. Yes; I would say that is right.

Q. You have 87 men listed for that date. Now, Mr. Borst, I would like you to check the record during the lunch hour and see if on November 11th you had only eighty men on that date to start this estimate with? A. Yes; I will check that.

Q. Now, I will pass that down to December 17th which is the last one you have listed so far as Sunflower is concerned. You have there 79 employees?

A. Yes.

Q. That is on the payroll of December 17th?

(Testimony of W. Lyle Borst.)

A. Yes.

Q. Now, hadn't you discharged everybody practically in the early part of that week, from the sixth on down, and by the 19th, hadn't you discharged everybody except some ten employees that stayed on the payroll from the 13th to the 19th [599] of December,—there were only a part of the men,—and on the 19th of December you had only ten employees, and here on this exhibit you have 79. Will you check and see if that is correct?

A. All right; I will do that.

Q. Now this figure totals 622, as the total number of employees that you claim were weekly employees, and that is divided by seven to give you an average of eighty-nine. That is a false figure now, because you admit here that the 100 on the first week in the exhibit should not be there at all, and subject to your checking on the other matters I have suggested as to the number you have on the payroll on November 11th, and the number you have on the payroll as of the 19th of December?

A. I will check those during the noon recess.

Q. Now then, will you turn to the preceding page, which would be page 138,—I am still talking about that exhibit No. 65,—did you, Mr. Borst, make trips during the period of this time from July 13th or 14th when you came on the job, up to the termination of the contract, and was it necessary to take trips away from there to supervise other work?

A. I made trips back to the office to report.

(Testimony of W. Lyle Borst.)

Q. Did you spend any time in connection with other jobs under your control at that time? [600]

A. There may have been a day or so that I might have been on some personal matters, too.

Q. I notice as a part of the extra expenses you have a figure of \$1,675.46, expenses for the first 120 days. That amount is \$1,675.46, from which you have deducted an arbitrary amount of \$418.86, leaving a balance of \$1,256.60, and under your expenses as listed you have various items there with no break-down at all, for instance, we will take the one on August 4th to 25th of \$250.25—was that a part of the expense of going back and forth to the home office, or do you have any recollection of those items? Have you any break-down or itemized expenses? A. Yes.

Q. I am calling your attention to the one of August 4th to 25th of \$250.25. What was that break-down?

A. Well, I had transportation there of \$70.00.

Q. Where was the transportation?

A. That was on the job. That was from the hotel to the site.

Mr. Watts: Explain what you mean by that “to the site.”

A. Well, I was living in Kansas City, and drove back and forth each day. That was a total of fourteen hundred miles at five cents a mile. There was car storage also, and hotel, \$75.00, meals, \$47.50, and then I had entertainment items, [601] making up the balance, except for an amount of \$4.00.

(Testimony of W. Lyle Borst.)

Q. Now, let me call your attention to another item, September 16th to the 29th, \$230.61; is that of similar purport?

A. Well, that is car mileage, 840 miles, which would be \$42.00; there is storage of \$7.00; hotel, \$44.61; meals, \$27.00, and the balance is entertainment and miscellaneous.

Q. About how much entertainment and miscellaneous would that be?

A. About a hundred dollars.

Q. The next item—let us take November 3rd to the 6th, \$133.32.

A. This item transportation by car, 320 miles, \$16.00. There is an item of storage, \$1.40; the hotel bill, including entertainment, \$78.00, and there are meals for \$10.00, and another item of \$27.00 miscellaneous expense.

Q. Have you any items where you made trips back to the home office for reporting?

A. Not in this, I haven't.

Q. Didn't you expect when you came down if you would spend only thirty days out of the one hundred and twenty days on the job, didn't you expect to spend considerable time in running back and forth looking after other jobs? Wasn't that expected?

A. Well, yes; I would have been expected to make some [602] trips.

Q. The items of expense—I am not now in the position of quarreling with any of these, Mr. Borst.

A. I understand.

(Testimony of W. Lyle Borst.)

Q. Do you think this should be paid as extra damages? Do you think you should obtain damages for this?

A. Well, if I had not been there for that period of time I would not have spent that money.

Q. But you would have spent the money back and forth as you contemplated in your original estimate for this period of thirty days, at least?

A. There would be some travel.

Q. Now, in reference to the home office expense being proportioned, did you pay rent to the Fegles Construction Company for any certain space?

A. I don't know whether that was paid by direct check issued to the building management by the Power Service Corporation, or whether it was pro-rated between the two offices, but it is a definite charge on the books.

Q. Are you a stockholder of the corporation?

A. No, sir; I am not.

Q. During 1944, do you know whether there were any dividends declared, or paid, by the corporation? A. Stock dividends?

Q. Yes. [603]

A. To my knowledge, they did not pay any dividend on any stock. That is true, to my own knowledge.

Q. They didn't pay any in 1945?

A. No, sir.

Q. And in 1943? A. No, sir.

Q. Since your connection with the corporation they paid very few dividends?

(Testimony of W. Lyle Borst.)

A. That is correct.

Q. They haven't paid any in the last ten years, have they?

A. I don't know that they ever paid any.

Q. Do you think you would know if there was a dividend declared?

A. Yes; I think I would.

Q. You were furnished office space in the power house building?

A. Yes, sir.

Q. You were allowed a telephone without expense for local service?

A. Yes, sir.

Q. You had no rent to pay on the site?

A. No, sir.

Q. Counsel mentioned in one of his questions that causes [604] me to ask this question: The rejection of your claim by the Chief of Engineers is contained in a letter dated March 12th, 1946. Do you recall that date as being correct as to the date of rejection of your claim?

A. I would like to check that.

Mr. Watts: We admit that.

A. Then I guess it is correct.

Q. (Mr. Gibson, continuing:) That didn't come direct to your organization? It went through the channels and arrived in your organization a number of days later?

A. The letter would be marked as received in our office when it was received.

Mr. Watts: It shows a date of March 12th, received by the company March 15th, addressed to the Power Service Corporation.

(Testimony of W. Lyle Borst.)

Mr. Gibson: The time when that came to us was March 26th, by letter of transmittal.

Q. (Mr. Gibson, continuing:) On that job, Mr. Borst, it was contemplated under the contract that certain plans and specifications might be changed from time to time, and might involve additional, or less work? A. Yes, sir.

Q. If the work involved a change of plans and specifications that was incorporated in a change order? [605]

A. A work order, or a change order.

Q. I am coming to the work order later. There was a difference?

A. Well, the area officers made a distinction for accounting purposes, but we could not quite see what it was.

Q. A change order might involve a situation where, for instance, the contract might call for a certain kind of fitting, or a certain type of valve, and you found that particular type of fitting or valve would not be available. A change order permitting the use of some other comparable material, which was available, might be issued. That was a change order?

A. That may be true. As I say, the differentiation never was clear to me. It was originated by the other people there, and I accepted it.

Q. Now, change orders, Mr. Borst, did they sometimes involve an increase of money to you?

A. Well, I think either one might, a change order, or a work order.

(Testimony of W. Lyle Borst.)

Q. Well, there is another distinct document which is a work order?

A. There seems to be.

Q. And that involved a direction to you to do some additional work? A. Yes, sir. [606]

Q. And that would come about by consultation with you, and the engineer, or representative of Cory-Joslin in most instances?

A. It originated with the engineering office, and they sent us a description of the work that they wanted dealt with, and we would then prepare an estimate on that work and submit it back to the engineers through Cory-Joslin.

Q. Sometimes that involved only one item, or they might accumulate until you had several items, rather than write a letter every five minutes on this sort of thing?

A. I think that is right.

Q. I call your attention to a letter of August 24th, 1944, signed by Mr. Borst, yourself, to the Cory-Joslin people, do you recall sending that letter? A. That is right; yes.

Mr. Gibson: I offer it as Defendant's Exhibit "H".

(Whereupon document referred to was marked Defendant's Exhibit "H" for purposes of identification.)

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "H" so marked for identification was admitted in evidence.)

(Testimony of W. Lyle Borst.)

Q. (Mr. Gibson, continuing:) Will you explain to the Court what that letter covers? [607]

A. Yes. This is in response to change order No. 1060, dated August 14th, covering ten extra work items necessary to complete changes in Hercules drawings, revised as of August 3rd, 1944. We quoted to them that we would furnish all the plant, equipment, labor, cutting, and welding materials, and perform all the work necessary to do the following extra work, and then the items were all listed there and prices were also listed.

Q. And the total amount of that was what?

A. The total amount was \$5,106.00.

Q. Now, Mr. Borst, under this change order amounting to \$5,106.00, was that approved after a discussion with the A-E-M?

A. Yes; I think that was approved within certain limits.

Q. And was incorporated in what was known as one of the modifications? A. Yes, sir.

Mr. Gibson: I am offering this so that the Court will understand the situation, and how this worked.

Q. (Mr. Gibson, continuing:) This modification dealt with a large group of these change orders based on your estimate, if Cory-Joslin would approve it, and the A-E-M approved it, and then the price was arrived at. The Area Engineer would approve it for the A-E-M, and in all these [608] matters you figured a margin of profit, did you not?

A. Yes, sir.

Q. You have no complaint now that you did

(Testimony of W. Lyle Borst.)

not work under this contract with reference to the changes in the plans and specifications, or the extra work directed by the Office of Engineers at a price you arranged? A. No, sir.

Q. That was the price you suggested, usually?

A. Yes, sir.

Q. The three modifications really covered a large number of change orders, all summarized under these three modifications? A. Yes, sir.

Q. The total amount of that ran something over eighteen thousand dollars? A. Yes, sir.

Q. There was a change order in reference to the header, I believe, which was, I remember now, \$114.00? A. Yes, sir.

Q. And that was included in one of these modifications? A. Yes, sir.

Q. There was another change order in reference to some water-wall tubes that involved one hundred thirty-seven dollars. That was in connection with some water-wall tubes, as I recall?

A. I don't remember that definitely, but the one on the [609] headers was a matter of relocating the header, or correcting a matter where there was a previous error.

Q. That is your signature, is it, Mr. Borst (indicating)? A. Yes, sir.

Mr. Gibson: I offer in evidence now Defendant's Exhibit "I".

(Whereupon document referred to was marked Defendant's Exhibit "I" for purposes of identification.)

(Testimony of W. Lyle Borst.)

Mr. Watts: I have no objection to any of these exhibits.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "I" so marked for identification, was admitted in evidence.)

Mr. Gibson: This is a letter addressed to Cory, Joslin & Macnsons from Power Service Corporation, signed by W. Lyle Borst, Chief Engineer, and is as follows:

"Sunflower Ordnance Works,
October 24th, 1944.

"Cory, Joslin & Macnsons,
c/o William F. Lozier, Broderick & Gordon,
Sunflower Ordnance Works, DeSoto, Kansas.

"Attention: Mr. F. V. Wedlick.

"Re: Completion of Power House No. 1, Lump
Sum Subcontract No. 5.

"Gentlemen:

"In connection with the work of remodeling the Combustion Engineer Company water-wall tubes as required to take care of the error in the size of header holes, we performed some work with our own men."

Q. This was where the holes were different from the size of the tubes? A. Yes, sir.

Q. And that is what this letter pertains to?

A. Yes, sir.

Mr. Gibson (continuing:)

(Testimony of W. Lyle Borst.)

“The cost of this work we believe will be paid by the Combustion Engineering Company. The cost of this work amounts to \$137.95. We believe this figure can be written in on work order when it is processed.

Very truly yours,

POWER SERVICE CORPORATION.”

Q. That is the way in which some of this extra work, this extra cost and extra charges was discussed, and arrived at, as the work progressed?

A. Yes, sir.

Q. That item was later on paid you in connection with Modification No. 2?

A. That is right. [611]

Q. (Mr. Gibson, continuing): Mr. Borst, during the noon hour what two items did you check on?

A. We went through the payroll records and made a tentative determination of the average number of employees day to day for the period mentioned.

Q. What period was that?

A. November 11th to December 19th.

Q. You made that check?

A. Yes; we actually had twenty-three hundred forty-six total and divided by thirty-three days, making an average of [615] seventy-one.

Q. That is instead of an average of eighty-nine that you had before?

A. Yes, sir. And we have introduced these figures into our computation; adding up the total

(Testimony of W. Lyle Borst.)

number of employees, we would then have a total of ninety-three for that period of time, which would result in a percentage of seventy-six to be allocated to this job instead of the eighty per cent which we showed, and which, in turn, would give us seventy-nine and one-half per cent as an average between the amount of money and the number of employees, which, in turn, would also reduce in our formula the amount of money to be paid from \$6,649.82 down to a new figure of \$6,486.63, and we also computed the number of employees on Sunday work.

Q. And,—

Mr. Watts: Will you read that into the record, Mr. Borst?

A. Yes. Our record shows August 6th, three men; September 3rd, 103 men; October 15th, three men; October 22nd, three men; November 5th, four men; November 12th, twelve men; November 19th, two men; November 26th, 69 men; December 3rd, thirty-nine men; December 10th, fifty-nine men; December 17th, ten men.

Mr. Watts: Were all of those dates you have just [616] read on Sunday?

A. Yes, sir; they were all Sundays.

Q. (Mr. Gibson, continuing): The computation you read covers the number of men working on the specified Sundays on the whole project; that included the whole job, brick-layers, boilermakers and all of the employees directly under your control?

A. Yes, sir; under the subcontract.

Q. And under your control? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. Not just the boilermakers?

A. There might have been men on the boilers that were not boilermakers.

Q. Calling your attention to the boilermakers, in your payroll schedule, Mr. Borst, you have page one that starts out with "Office Employees," and your superintendents. I think then the piping superintendent? A. Yes, sir.

Q. Page No. 2 starts out with the boilermakers, I believe? A. Yes, sir.

Q. And then you skip a space and start with the boilermaker helpers? A. Yes, sir.

Q. And the subsequent pages take up the different crafts, [617] such as steamfitters, or some other craft? A. Yes, sir.

Q. The boilermakers, one can see by the term "boilermaker," as you look at the payroll?

A. Yes, sir.

Q. During this period of time continuously before September 3rd,—September 3rd was the day you had the large number working?

A. Yes, sir.

Q. Practically the whole force?

A. Yes, sir.

Q. And I asked you if November 5th was the only time you had any boilermakers working on Sunday. Will you tell us? I think you had four?

A. Yes; four is right.

Q. Now, do you mean to indicate that the record covers every Sunday on which boilermakers were working?

(Testimony of W. Lyle Borst.)

A. I didn't get to a particular craft. I took the total number of men on the project.

Q. Did you check far enough to see,—as you got to these men, the thirty-three boilermakers, exclusive of the helpers, with the exception of the four of these men that were involved in the turn-over, or just came off and on, you continued through with twenty-eight or twenty-nine men that stayed with you until [618] you terminated their employment?

A. We didn't get into that analysis this noon.

Q. The reason for this, Mr. Borst, is the question of turn-over, and having to break in new men. Now, Harry Precht started as lead man and was advanced to foreman, and continued as foreman straight through? A. Yes, sir.

Q. Mr. Biggs was lead man and then he continued on until some time in September when he resigned, and was immediately replaced by Mr. Mairs, and he continued as lead man until September?

A. I agree with that. I did not get into it at noon, however. We did not get that far into that phase of it.

Q. Now, then ten men on December 17th, was that your office force?

A. Some of them were.

Q. I believe you stated a few minutes ago that ten worked on December 17th? A. Yes, sir.

Q. And was that the office force?

A. Some of them were.

Q. You had only four laborers on the 17th because all of the crafts were dismissed?

(Testimony of W. Lyle Borst.)

A. Yes; these might have been key men. [619]

Q. I believe you had six people in your office force? A. They were probably there.

Q. You had four laborers besides that, and that was the ten you mentioned on December 17th?

A. That is probably correct.

Q. Now, glancing at that list, will you state whether or not outside of September 3rd when you had practically the full crew, all of this overtime was after November 10th?

A. Yes, a good portion.

Q. A good portion was after November 10th?

A. Yes; most of it was after November 10th.

Q. Will you follow that through now, Mr. Borst, and get that other information with reference to the number of employees I asked for before?

A. Yes, sir.

Q. Was it necessary toward the end of the contract prior to November 10th to have some clean-up men to keep the boilers operating and clean up the rubbish, to have the boilers fired, men working around there cleaning up?

A. Yes; we were working in that way. We were working on that work on Sundays as any other day.

Q. After you had,—strike that, please. Do you understand now, Mr. Borst, what I still wish you to check-up?

A. Yes; I think I understand. [620]

Q. After you had these defective headers that were repaired, or replaced, and the nipples welded onto the tubes so that they would reduce the header

(Testimony of W. Lyle Borst.)

size from three and a half inches to three inches, after these were delivered and all of the tubes were delivered on the job, was there any reason then for delay in your work in completing your contract?

A. No; we worked then as rapidly as possible.

Q. There was no reason to hold you back any further?

A. No; after this material arrived we were able to go forward.

Q. A man by the name of Neubauer, he was the man who succeeded Delbert C. Smith as power engineer on behalf of the A.-E.-M.?

A. Yes, sir.

Q. Do you remember of any conversation with him to the effect that the failure on your part to get the inventory on the steam generator equipment was one of the principal factors in delaying your completion of the contract? Do you remember that?

A. No, sir.

Q. Do you remember any discussion with Neubauer about it?

A. No, sir.

Q. Do you remember any complaint to you that your delay [621] in getting the inventory on the steam generating equipment was holding back the completion of your job?

A. No; I don't remember that Mr. Neubauer made any direct reference at all in any conversation to me.

Q. Now, from your own recollection, do you know yourself that the steam generating equipment inventory was very much delayed?

(Testimony of W. Lyle Borst.)

A. I don't think that was the case. It was a matter of what someone might have thought about it, but I don't think it was the case.

Q. There was some eleven items that you were relieved from completing when the contract was finished, that were turned over to someone else?

A. These units were in operation.

Q. I don't mean any big items,—the whole amount was about six or seven hundred dollars. There was some steam leaks and such?

A. Some steam leaks that had to be fixed, and rather than have us stay there, arrangements were made to take care of it at our expense. Those had to be fixed when they shut it down, and of course rather than have us wait for that it was agreed to have someone do it at our expense.

Q. As you progressed it appeared that the installation would not be completed by November 10th,—do you remember that [622] any discussion with the Area Engineer and the defendant in this action in which you were told that if one boiler was gotten into operation some time in the early part of December, or late November, it would not necessitate the extra,—

A. (Interposing): Mr. Gibson, in that respect we got that unit into operation in the time needed to fit their schedules.

Q. It wasn't before the tenth of November?

A. No, sir; it was in the interval between the tenth of November and December 19th.

Q. Have you a copy of the contract there?

(Testimony of W. Lyle Borst.)

A. Yes.

Q. What do you mean, Mr. Borst, by "premium labor?"

A. Well, it might be in terms of labor used under overtime or double time payments.

Q. You had straight time, forty hours a week, in which straight time pay is involved, and if you worked the men over that time you would have to pay a premium,—Mr. Borst, will you please look at me? I am sure that your counsel does not want to prompt you. The witness keeps directing his attention to counsel. Premium time comes about when you work these men overtime Sunday and Saturdays?

A. Yes, sir.

Q. Now during this contract, near the tenth of November, [623] was there not a discussion between yourself, a representative of the A.-E.-M., and the defendant in this case with reference to getting in as much as possible to avoid putting on any penalty time, and didn't you ask that they pay a premium, and you were told that if one of the boilers was in operation they could get along by keeping down the labor costs by operating only the one shift?

A. No, there was no specific conversation that I remember.

Q. There were several conversations with reference to getting this job done?

A. Yes; this Area Engineer, or his representative, Mr. Downing, came onto the job every day or two and Major Matthews came and discussed the project in general. My memory fails me just now

(Testimony of W. Lyle Borst.)

that anybody directed or suggested that procedure to follow.

Q. The general subject of conversation in all of these instances was when this job was to be done; wasn't that the principal source of conversation with Mr. Downing and with Mr. Matthews?

A. Yes; we did talk about it.

Q. Neither of them tried to penalize by demanding a double shift? A. No, sir.

Q. Now then, will you turn Clause 1-6 of the specifications [624] and look under subdivision (b) of paragraph 1-10,—I meant to say, turn to page 16, and to subdivision (b) of paragraph 1-10.

A. Yes; I thought that is what you meant, Mr. Gibson. I have it here.

Q. That clause reads: "The subcontractor shall furnish sufficient forces, construction plant and equipment, and shall work such hours, including night shifts, overtime operations, and Sunday and holiday work as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the constructor, the subconstructor falls behind the progress schedule the subconstructor shall take such steps as may be necessary to improve his progress and the constructor may require him to increase the number of shifts, overtime operations, days of work, and/or the amount of construction plant, all without additional cost to the constructor." You are familiar with that clause? A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. And you at no time instituted double shift work? A. No, sir.

Q. And very little of the whole time did you have any Sunday work except what you have told us here? A. That was all.

Q. Neither the defendant or the Area Engineer, or Project [625] Engineer tried to penalize you by putting in double shifts to get caught up with the work? A. No, sir.

Q. When you put in the progress schedule you knew that certain materials would have been required at that time to carry on that schedule, would they not,—when you presented the progress schedule you knew that the schedule was not being kept up?

A. At that time we knew that we were delayed on account of the tubes.

Q. At the time you put in the progress schedules you knew that they were not there?

A. That is right.

Q. And from the time you put in that schedule up to the time that you completed the job, you did not catch up with the schedule?

A. That is right.

Q. You were not penalized by the Area Engineer or the defendant, nor the Project Manager?

A. No, sir; they were entirely familiar with the conditions under which we were working.

Q. Periodically you were paid,—the plaintiff in this action got paid, I believe every month for the

(Testimony of W. Lyle Borst.)

preceding work, for the work completed during the preceding month? [626]

A. In general, that was true.

Q. That was the plan?

A. Yes; that was generally done.

Q. How did you and the defendant arrive at the sum of money due you at any monthly interval?

A. An estimate of the work as evidenced by the progress chart.

Q. The chart showing the actual amount of work completed, as distinguished from the schedule designating what you hoped to be completed?

A. It was paid on the estimate of the work that was evidenced by the progress chart.

Q. It was on this chart,—that was the basis upon which you were paid? A. Yes, sir.

Q. Now, isn't it a fact that the reason for a progress schedule is to determine how you were to be paid?

A. That was one of the functions.

Q. Without that there would be no basis upon which you could be paid for any period of work?

A. You would have to make an estimate of the actual value of the work done in some way or another there, by comparing the payroll to the total contract price, or some other mathematical operation. [627]

Q. Isn't it a fact that on all of those contracts they required a progress schedule to outline the proposed, or hoped for, method of doing the work, and the hoped for completion date, and, second, the

(Testimony of W. Lyle Borst.)

basis for determining the amount of pay that you are entitled to receive; aren't those the two reasons for the progress schedule?

A. The progress schedule, and the break-down of the contract price.

Q. Yes; that coupled with the estimate you arrived at of \$448,000.00? A. Yes, sir.

Q. You submitted one which was sent back to you, and then you sent another three days later with a better break-down that was accepted?

A. That is correct.

Q. You offered one, I believe on the 10th of August, which was not the first one you prepared but was the one accepted? A. That is right.

Q. Now, turn to page 1-4 of the specifications, Mr. Borst, and I call your attention to paragraph 1-05, entitled "Commencement, Prosecution and Completion." This is paragraph 1-05(a): "The sub-constructor will be required to commence work under the subcontract within five calendar days after the [628] date of receipt by him of Notice to Proceed, and will be required to prosecute said work faithfully and energetically and to complete the work within one hundred twenty calendar days, the time to be computed from the said date of receipt of Notice to Proceed, except as provided hereafter in this paragraph." You understand that paragraph, don't you? A. Yes, sir.

Q. Did you, in connection with this contract, consider that you were obligated by that clause in any manner?

(Testimony of W. Lyle Borst.)

A. Yes, sir. The clause was a part of the contract, and it was entirely recognized.

Q. And you did your best to comply with it?

A. Yes, sir.

Q. You had no objection to that clause, and you understood that in going along with the contract you accepted that as a part of your contract?

A. Yes; with the exception of the fact that I recognized that as a result of the material shortage situation we would never be able to make the one hundred twenty day completion.

Q. You used this as a basis of determining your claim for damages, one hundred and twenty days after the notice, and that is how you arrived at November 10th?

A. Yes, sir.

Q. You did adopt Paragraph 1-05 in your conduct— [629]

A. (Interposing:) Yes, sir.

Q. Paragraph 1-05, subdivision (b): "In the event the total payments for work actually constructed by the subcontractor under the subcontract exceed the original amount of the subcontract, the time for completion of the subcontract will be extended in the proportion that payments for work in excess of the original amount of the subcontract bear to the total original consideration of the subcontract. In case the total work actually constructed is less than the specified amount, the time for completion of the subcontract will remain the same as specified herein." You understand that paragraph, and understand what it covers?

A. Yes, sir.

(Testimony of W. Lyle Borst.)

Q. What do you understand that to mean, Mr. Borst?

A. In the event there had been a class of work added to the contract which would have required additional time, that the contract time could have been extended in direct proportion to the amount of money involved for this work, compared to the base amount of the contract.

Q. Where is there anything in there that requires extra time? Does that clause provide for extra money—that extra time will be added in relation to the amount of the extra contract work?

Mr. Watts: We object to that as incompetent, irrelevant [630] and immaterial.

The Court: I think I will permit him to answer, if he can.

Â. Well, in bringing the work into being and writing up the cost, and considerations for it, no time was established attributable to that particular work.

Q. In Modification No. 1, I call your attention to Paragraph four of Modification No. 1, which is attached to the main exhibit—I don't recall the number of the exhibit at this time—oh, yes; here it is, No. 21. I am reading to you paragraph four of page seven of the Modification: "It is understood and agreed that an adjustment of time for the additional work occasioned by this modification, if necessary, will be made at the time of final completion of all work done under the subcontract."

(Testimony of W. Lyle Borst.)

A. That is correct. We did not ask for additional time for that work.

Q. And the total amount of that extra work ran something over eight thousand dollars?

A. Yes, sir.

Q. Have you computed that into the original figure of \$448,000.00? A. Yes, sir.

Q. About five days is what it figured according to my figures?

A. Well, it would be about five per cent of the total time. [631] That would be about six days.

Q. Between five and six days, so that under that clause your real time of completion was November 15th instead of the tenth, except that you refused to accept it?

A. It had no effect on our time. That was done in step with other work.

Q. There was no penalty of so much a day, or week, for failure to complete on November 10th?

A. No, sir.

Q. The only penalty was to take you off the job and use your equipment and sue you on your bond for the extra cost to the Government?

A. That is right.

Q. You asked for extra time—that was not filed until around the 20th of November, even though it was actually dated on November 10th, so that the contract was completed at the time you were offered extra time and you refused it. That was in 1945, long after you got off the job?

(Testimony of W. Lyle Borst.)

A. That was written into this modification without any review by ourselves.

Q. That was on Modification No. 3 which covers the over-all picture, and you refused it?

A. That is right.

Q. There is no possible way, even though it was dated [632] back to November 10th, or if it had been dated back to the 1st of July, there was no penalty that could have been invoked for delay?

A. That is right.

Q. You insisted on not taking that extra time because you, as the plaintiff, believed that it might waive some right you may have for damages?

A. That is right.

Q. And that didn't come up until March or April of 1945?

A. The modification was submitted to us in February.

Q. And you rejected it? A. That is right.

Q. Calling your attention now, Mr. Borst, to subdivision (c) of Paragraph 1-05 of the Specifications: "When conditions at the site of the proposed work are considered by the constructor to be unfavorable to its prosecution, the constructor may order the subconstructor in writing to suspend work under the subcontract until the constructor considers that the unfavorable conditions for the prosecution of the work no longer exists. When the work is so suspended the time allowed for completion will be increased by an amount equal to

(Testimony of W. Lyle Borst.)

the time of suspension as determined by the constructor." You understand that clause, don't you?

A. Yes, sir.

Q. And under that clause your work was not suspended at [633] any time?

A. No, sir.

Q. Did you ask that it be suspended because of the absence of necessary material to make progress on the job?

A. No, sir.

Q. You had something to do there all of the time, did you?

A. Well, we paced the work to keep going.

Q. On two or three different days you had a little rain?

A. That is right.

Q. On one or two days it prevented you from keeping the men on the job; one was a big hole in the chimney and rain came in and you had to lay off the men?

A. I don't seem to remember that.

Q. There was no complete lay-off due to weather conditions?

A. No, sir.

Q. And you didn't think that conditions at the site justified a lay-off, or the suspension of work, for any period of time because of the absence of materials?

A. We didn't make that demand.

Q. Paragraph (d) of Clause 1-05 of the Specifications: "If the subcontractor fails to perform the work at a rate satisfactory to the constructor as specified in subsection (a) above by reason of delays in the delivery of materials [634] or supplies essential to such performance, because of war prior-

(Testimony of W. Lyle Borst.)

ities, or, because of conditions existing through no fault or negligence of the subconstructor, he may be excused for such failure upon the presentation to, and the approval by, the constructor of a written statement setting forth distinctly the causes for such failure." You approved of that clause?

A. Yes, sir.

Q. And you followed it to the extent that you did ask for an extension of time in a letter of November 10th?

A. Yes, sir.

Q. And you didn't like the next clause, so that in that letter of November 10th you objected to the provisions of subdivision (e), which I will read to you,—you know that, Mr. Borst?

A. Yes, sir; that is right.

Q. You accepted paragraph (d) but rejected paragraph (e) in that same letter?

A. That is right.

Q. Subparagraph (e): "In case time for completion of the work is increased due to any of the causes specified herein, it is distinctly understood and agreed that the subcontractor will accept the additional time in which to complete his subcontract, in full satisfaction of any delays encountered and the constructor will not be liable for any [635] costs or expenses incurred by the subconstructor as a result of the increased time for completion of the subcontract." That part of clause 1-05 you,—in that letter that you didn't want to include?

A. That is correct.

Q. Under this contract,—have you ever had one

(Testimony of W. Lyle Borst.)

where there was a penalty clause of so much a day if you didn't complete on time?

A. I was trying to think.

Q. During the war it was not the policy of the Government to invoke this clause?

A. I think that is right.

Q. And by the same token wasn't it the policy of the Government because of the possibility of delay to also waive liquidated damages in the event that the delays went beyond the time they anticipated? A. Yes, sir.

Q. They gave you additional time and you, in turn, accepted that time? A. Yes, sir.

Q. Subdivision (f): "Inasmuch as the provisions of the subcontract documents relating to the time for, and the rate of, performance of the work and the time for completion of the same are inserted for the purpose of enabling the United [636] States Government to proceed with the construction of the Sunflower Ordnance Works in accordance with its predetermined program of war effort, such provisions are of the essence of the subcontract." You understand that clause, Mr. Borst?

A. Yes, sir.

Q. Do you agree with that part of the contract, and were you in full accord in your operation with subdivision (f)? A. Yes, sir.

Q. And subdivision (g) of the same contract, which is 1-05: "No liquidated damages are provided for under the specifications, nor will such damages be provided for in the subcontract." That

(Testimony of W. Lyle Borst.)

clause, although it was in the specifications, you didn't agree with,—I will withdraw that, please. You don't consider that you are bound by that clause?

A. Liquidated damages, as a rule, are considered as against the constructor.

Q. Not liquidated damages.

A. As against the constructor.

Q. Under subdivision (g) which reads: "No liquidated damages are provided for under the specifications, nor will such damages be provided for in the subcontract." You mean [637] that no penalty would be invoked against you for failure to complete, and by you, I mean the plaintiff in this action?

A. Yes, sir; we understood that there would be no damages which could be assessed to us,—to the plaintiff.

Q. Against you, or in favor of you?

A. Against us.

Q. From the time you started on this contract and up to the modification was there any thought, or any belief, that Mr. Joslin had breached his contract in the matter of supplying these materials?

A. Yes; we thought so.

Q. You were on the job,—did you feel that Mr. Joslin had violated the terms of his contract?

A. Yes, sir, definitely.

Q. With reference to what?

A. With reference to the supplies or materials which would have been,—which were needed to per-

(Testimony of W. Lyle Borst.)

form the work in an orderly, proper and regular manner.

Q. And you felt that the procuring of the material was a burden placed on Joslin,—on the defendant in this case, and that there was no corresponding burden on you to get in the requisitions based on the inventory given by you?

Mr. Watts: That is objected to as being argumentative. [638]

The Court: He may answer.

A. That list of material was known to be on file and coming forward, just exactly as if it had been filed regularly, because in the verbal manner in which it was handled it was understood to be the same as if it was filed, by virtue of the entire understanding that was had. That material was understood to be on order.

Q. And for that reason did you look to Hercules, or to some other organization, to supply this material instead of Mr. Joslin?

A. We looked to Mr. Jung of the Joslin organization, or to Mr. Wedlick, who, in turn, were very definite in their statements that we would receive this material through those channels.

Q. You felt that excused from the performance of your contract?

A. I had gone along with the performance of my contract because as long as the orders were definitely established there was no detail for me to take care of, at least I thought that.

Q. Now, Mr. Borst, on this other matter, at

(Testimony of W. Lyle Borst.)

your home office do you have a switchboard operator,—a community operator, or do you and the Fegles Construction Company operate through different switchboards? [639]

A. We have a common system.

Q. You mean by that it is a common system where there is someone who acts as the operator and diverts the calls to the party it should go to?

A. Yes, sir.

Q. What part of the Fegles Construction Company's office is occupied by the Power Service Corporation, and what part is occupied by the Fegles Construction Company?

A. I would say, roughly, it is about half and half.

Q. And the equipment that you rent,—the Fegles Construction Company from whom you rented the equipment is the same Fegles Construction Company that occupies the quarters with you at the home office?

A. That is correct.

Q. Have you any record of the total amount of money you paid for rental of equipment during the time that you worked on the contract in question here,—not the thirty-nine days, but the full period of time, the amount that you paid in rentals?

A. Several thousand dollars. I don't have the figure here.

Q. Have you a fair approximation of it?

A. I would say ten thousand dollars.

Q. Do you have the figures so that you could get them and have the correct amount for us? [640]

(Testimony of W. Lyle Borst.)

A. I will try. I know there are some that are available to us here.

Q. I understand then that some of the figures are here? A. Yes.

Q. (Mr. Gibson, continuing): Were you able to check on any of the figures that we were talking about?

A. I think possibly I could get it tonight.

Q. I understood you to say, Mr. Borst, in your examination under Mr. Watts that the progress schedule showed when the delivery of material was required. Now then, have you a copy of this progress schedule?

Mr. Watts: Which one do you want?

Mr. Gibson: Anyone that shows the date of materials required.

Mr. Wats: Yes; we have them in our exhibits.

Q. (Mr. Gibson, continuing): Will you explain it as you go along? You are looking at a progress schedule now,—the one you have there is not dated, is it?

A. Well, the one from which this one was made was dated. This was revised on August 17th, in which we broke it down. It [641] shows here the operation in connection with the drums,—it is shown for boilers Nos. 1, 2 and 3. The operation requiring the drums,—naturally, the drums would have to be there back in July. I think it was about the 22nd,—no; I guess the 19th, and the boiler tubes would have to be there on the 19th of July.

Q. That was for what boiler?

(Testimony of W. Lyle Borst.)

A. Well, Boiler No. 1 is right here (indicating), and Boiler No. 2 is shown here (indicating).

Q. Boiler No. 2 would be on what date?

A. On the 21st, the boiler tubes for Boiler No. 2, —the 21st of July.

Q. That was your first proposal?

A. That was the revised proposal.

Q. Work on boiler tubes would continue from the 21st of July until what period, or, rather, during what period of time?

A. Until August 24th.

Q. From the 21st of July to the 24th or 25th of August, during which time your schedule called for work on Boiler No. 2?

A. On the tubes; yes.

Q. And now as to Boiler No. 3?

A. The tubes were to commence on the 5th of August, and continued until the 6th of September.

Q. And from that the schedules were made by the A.-E.-M.? A. Yes.

Q. Did those schedules conform with the designation, or limits placed by your proposal, or revised schedule of August 17th?

A. Yes, sir.

Q. Have you one of those here,—I believe Mr. Watts is looking at Exhibit No. 52.

A. We have this chart. All of the work is mapped under Boiler No. 1 in one space, and here (indicating) is Boiler No. 2 and No. 3, different arrangement than we used here (indicating). That shows the setting of the drums on July 19th, and

(Testimony of W. Lyle Borst.)

work on that boiler drums, tubes, water-wall and header tubes progressing through to August 23rd.

Q. Beginning on what date?

A. July 19th.

Q. That was Boiler No. 1?

A. Yes, sir; Boiler No. 1.

Q. Is it your contention that indicates the tubes should be there at the commencement of your operations, or sufficient tubes to work with?

A. We have that,—the tubes, yes. We didn't cover that before. We didn't reach that. This same chart I have here shows exactly when the water-wall tubes were to be there, the [643] exact dates when they were to be there are shown here (indicating). They are shown as August 1st, August 8th and August 15th on the three boilers, respectively.

The Court: Is this material,—doesn't the testimony show that there is no claim here until the latter part of August on account of non-delivery of these tubes?

Mr. Watts: No. Our claim was that they were due on August 1st to August 15th.

The Court: I am talking now about the claim for damages, whatever date that is. My recollection of the evidence was that the first claim for damages was, I believe, the 28th. I am not sure, but my memory is Mr. Borst read that from some exhibit, or, at least, there was some testimony to that effect. I cannot see why this testimony offered at this time is material.

(Testimony of W. Lyle Borst.)

Mr. Gibson: Well, if I may go on a little further with this questioning?

The Court: Yes, you go right ahead. I was just wondering about the record we are making here.

Q. (Mr. Gibson, continuing): Now, Mr. Borst, the progress schedule you referred to represents the date you proposed to start erecting certain segments of the work, and you allocated to that a certain number of days; isn't that what you put in a progress schedule?

A. Yes, that is, certain operations were delegated to [644] certain days.

Q. If that segment of work could be completed in a certain number of days that has no reference, or is no basis, for any fixed crew? It does not explain the number of men working on the operations in this schedule?

A. No; this was normally an exhibit of the allotted time.

Q. And whether that happened to be between the twenty-fifth of one month and the fifth of the next month, that schedule simply covers a certain amount of work that you proposed to do in a certain period of time? A. That is correct.

Q. In connection with this contract there is a term used as a "Punch List?"

A. That is correct.

Q. What is that?

A. That is a list made up by someone with authority showing items of work which are yet to

(Testimony of W. Lyle Borst.)

be done, or which are to be corrected in some manner.

Q. After the work is done and inspector comes from the A.-E.-M., or the defendant. Even after the inspection by the Government, if there is some deficiency in the work a punch list is made up and then you make up the work?

A. That is correct. [645]

Q. There were several items on the punch list?

A. Well, it was made up in this way: In order that all aid be given and cooperation had on the part of everyone, including the inspectors, the list was made up. Everybody knew that certain items of work had to be made up, and it was on the list. This was done in order that there would be no misunderstanding of what was necessary to fulfil the contract.

Q. In connection with this contract, except for the tubes,—the water-wall tubes and such, the rest of the materials were supplied to you in good time?

A. Yes, sir.

Q. They were delivered right to the place you ordered? A. Yes, sir.

Q. In fact, it got to the point in the construction of this work that you were getting deliveries so promptly that you didn't order until the last moment?

A. You say we did not order until the last moment?

Q. I say, it got to the point in the construction of this job that you were getting deliveries so

(Testimony of W. Lyle Borst.)

promptly that you didn't order until the last moment because of such quick and prompt deliveries?

A. I don't feel that was the case.

Q. I am talking now, Mr. Borst, about the standard items.

A. Well, that might possibly be an analysis of it. You [646] understand in a job of this kind there is a considerable amount of work done in keeping with good workmanship, and there is no written statement of such work. There is no detailed list made or used, and therefore you just go forward and do the work to the best of your knowledge and belief, if it is being executed in a good workmanlike manner. Of course in doing so you may have a certain amount of criticism and it may be justified criticism which may come from the overseer. He may point out, for instance, that it would be nice to have an additional bracket, or an additional hanger on a certain pipe line, or it may be that some piece of equipment is not set in a place that is the best, according to his judgment, and, of course, his criticism, as I say, may be warranted, and you just say, "Fine, we will do it as soon as we have the supplies, or we will get the supplies necessary and do it."

Q. Is that what you mean with reference to the forty requisitions after November fifth that were for certain items that you needed?

A. I don't get the distinction.

Q. Well, you say there are instances where the inspectors may ask for some change or some addi-

(Testimony of W. Lyle Borst.)

tional work as a cautionary measure, or to make the job better, and you order these items in order that you may do the work? [647]

A. Well, that may be true, and it may be that those instances are rather extensive, but I used a very simple illustration. You understand this may be in connection with some particular portion of the system, or it may extend to the entire system.

Q. Where there was additional work you got modifications so that you could get additional pay?

A. Well, not necessarily. It may come up in the inspection. You do the job, if it is a minor one, when the inspector suggests.

Q. But, Mr. Borst, if there is a question arises and you do not agree you have a right to ask for a determination? A. Yes, sir.

Q. That is, if you feel that it is outside of the scope of your contract? A. Yes, sir.

Q. There is no complaint at this time that any of that existed?

A. No, sir. I was simply pointing out that by reason of the way this is executed and the way it is handled, this situation giving rise to the question as to the absence of material and its coming forward,—

Q. (Interposing): Well, Mr. Borst, coming back to my question: Were not the supplies that were requisitioned delivered to you so promptly that you delayed in ordering [648] them until you actually needed them because of the fact that all

(Testimony of W. Lyle Borst.)

speed was given to getting the supplies to you on time?

A. No; I don't feel that there was any advantage taken of that situation, because it was to our advantage to keep the work ahead as much as it was to anyone's.

Q. I don't mean to imply that any advantage was taken, but simply that there was a whole-hearted cooperation in getting the material as promptly after the requisitions were filed as possible?

A. I would say that the defendant made every effort to get the material. I would want to point out that he did not always control the situation, but I would not want to say that the defendant was indifferent to the situation.

Mr. Gibson: I don't believe I have any further cross examination.

Further Cross Examination

By Mr. Scholz:

Q. Mr. Borst, just a question or two: The other day you stated to me that consideration for the additional clause was the continuation of the job. By that I understood you to mean that if this other clause was not added then you would refuse to do this further work. Was my understanding correct in that?

A. We did not make the statement that we would not do further work, but the inclusion of the clause satisfied us [649] on that point.

(Testimony of W. Lyle Borst.)

Q. You still don't answer my question. You said to me in answer to a question that the consideration for the additional clause was the continuance of the job, and I ask you by that, I understand you to mean, Mr. Borst, that the Public Service Corporation would not continue the job, or would not have continued the job unless that clause was added? Is that a correct interpretation of your statement, or not?

A. Well, it had a bearing.

Q. Was my interpretation of your statement correct, or not? A. Yes, sir.

Q. My interpretation is correct?

A. Yes, sir.

Q. Will you please show me any indication, orally or written, that you gave to the defendant, or for that matter, to anyone else connected with this, that you refused, that is, that the Power Service Corporation refused to go on with the work unless that clause was added?

A. No; there was no written expression to that effect.

Q. There was no written or oral indication that you would not go on with the work?

A. That is correct.

Q. The specifications, as they were written, are exactly [650] as they were intended to be written by the drawer of the specifications?

A. I don't understand that question, Mr. Scholz.

Q. The specifications, under which you submitted your bid and became a party to the contract,

(Testimony of W. Lyle Borst.)

they were written as the drawer intended them to be written, and you don't claim that the drawer made any mistakes in writing these specifications?

A. I maintain this: The man who drew these specifications was obliged to change them from the form he had originally written them in. These specifications were then adopted by the defendant, and therefore, the specifications as issued to the contractors, ourselves included, did not purport the thing which the original writing intended to purport.

Q. As I understand you, Mr. Borst, you contend now that the writer didn't intend to write the specifications as they are written?

A. He did not write them that way to start with.

Q. Do you have any knowledge, or, rather, did you have any knowledge of what the drawer had in mind at the time you bid on the specifications?

A. I did not.

Q. Whatever the drawer had in mind was something that you had information of after you had made the bid?

A. After we had completed the work. [651]

Q. Anything that the drawer had in mind did not effect in any way your bid?

A. It could not have affected the bid. I was bidding on the written specifications as they came to me.

Q. You acted on those specifications as they were at the time, did you not?

(Testimony of W. Lyle Borst.)

A. Yes, sir.

Q. Under the specifications you bid on,—strike that, please. Mr. Borst, the specifications which you bid on were the same specifications which are a part of the contract which you signed and operated under? A. That is correct.

Q. There are no changes? A. No, sir.

Q. The boilers were completed October 27th, 1944?

A. The boilers, as a whole,—the work as a whole, including the boilers, was all consummated at the same time, on December 19th.

Q. Were the boilers not completed before December 19th?

A. We had a portion, one unit, some time before that time, a considerable number of days before that time, but not all three of them.

Q. Did all of the work cease on the drums, the tubes, the water-wall tubes on October 27th, 1944?

Mr. Watts: We ask, if the Court please, that the witness be permitted to have a construction schedule.

Mr. Scholz: Surely.

A. May I have the final one? Of these charts?

Mr. Watts: This one?

A. The final date for setting the drums, the tubes, the water-wall tubes and headers appears on the final chart, and so marked as one hundred per cent on December 1st.

Q. (Mr. Scholz, continuing): December 1st, 1944? A. That is right, on boiler No. 1.

(Testimony of W. Lyle Borst.)

Q. Then the date of October 27th is incorrect?

A. That is right. I don't know where it comes from.

Q. If the work on the tubes, headers and drums ceased on Dec. 1, 1944, it was not necessary to have any equipment for the work after December 1st?

A. That was on Boiler No. 1. That date pertains to Boiler No. 1.

Q. I am speaking of all work on the tubes and headers, if that was not finished on October 27th? I understood you to say, however, that it was on December 1st?

A. On Boiler No. 1, it was, and on Boiler No. 3 this chart shows that it was completed,—the boiler proper, the tubes and headers on December 7th. That chart would bring [653] that fact forth.

Q. And what about Boiler No. 2.

A. No. 2 was completed on December 19th.

Q. Mr. Borst, did you understand that any material that was short, or missing, that you were to make requisition through Mr. Joslin for?

A. Yes, sir.

Q. And that the materials to be furnished would come through the Government?

A. Through the Government ordering and paying for.

Q. The Government was to furnish the material?

A. In the final analysis the Government was furnishing it; yes.

Q. Now, in regard to the claim of loss of effi-

(Testimony of W. Lyle Borst.)

ciency, those crews that you had were they skilled, or unskilled? A. Skilled crew.

Q. Now, these Quonset huts that are put up in two days, a crew will put the first one up in two days, and then possibly two or three days later they do it again in the same time. If the crew is skilled and they go to one operation, and then go somewhere else and do some other work, and then go back to the operation that would be like the first one, they would not increase their efficiency because they are skilled to begin with?

A. Your example is quite inadequate. [654]

Q. Well, that is the only thing that I know anything about. Now, these boiler crews are skilled to start with, and this second operation they are skilled at that, and they would not be any more skilled, no matter how many operations?

A. Well, familiarity and acquaintanceship that is gained permits a finer and a more able performance on the second operation, and so on, on the third.

Q. Before you started on the work you knew that the tubes and headers were missing?

A. Yes, sir.

Q. Isn't it a fact that without the inventory which was called for by the specifications, it was impossible to determine the material shortage?

A. The inventory showed the basic shortage, but here was the situation, Mr. Scholz—

Q. (Interposing:) Now, please, Mr. Borst, can you just answer my question yes or no.

(Testimony of W. Lyle Borst.)

A. Well, in that case the answer is no. We have a situation in which the material shortage was absolutely established. It was a definite factor. It was so determined and known to the defendant, in view of the fact that it was known to the people supplying the material to him. It was known by virtue of the actual listing of the material, [655] which was shown as never having been supplied under the original order. There is a deficiency established, a definite quantity of tubes and material that they had failed to supply, and that deficiency was established immediately.

Mr. Scholz: We move to strike that answer as not responsive. Without the inventory it was impossible to determine what material was missing and what the shortage was on the job. I think the answer is clearly not responsive.

The Court: I don't believe that it is responsive to the question, and I want to say to you gentlemen now that I think I know all about this. It has been gone over time and time again for days before the Court here, and I would say that possibly this answer is not responsive, and I think it should be stricken. We all know that the material was not there. It seems that it should have been apparent to anyone. The plaintiff knew it was not there; the defendant knew it was not there, and it seems to me that everybody else knew that it was not there.

Mr. Scholz: I believe that is all the examination I have.

(Testimony of W. Lyle Borst.)

Redirect Examination.

By Mr. Watts: [656]

Q. Will you please refer to Plaintiff's Exhibit No. 29 and tell the Court when the delay started on Boiler No. 1—what date?

A. We were up to the delay on Boiler No. 1 on August 1st, in view of the fact that the tubes were not there at that time, and did not arrive until August 17th, which was a sixteen day delay.

Q. That is exhibit No. 29?

A. Yes; it is.

The Court: I got that impression as to the delay. I thought it was from Exhibit No. 27.

Mr. Watts: This is Exhibit No. 29, your Honor.

Q. (Mr. Watts, continuing:) Was the job in any way delayed by reason of any of the requisitions that were filed by you after requisition No. 33?

Mr. Scholz: We object to that as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness. The requisitions speak for themselves. The plaintiff was required to file a material list.

The Court: I understood that there was no claim for damage under this requisition. I believe he may answer.

A. There was no delay on account of these requisitions. [657]

(Testimony of W. Lyle Borst.)

Recross Examination.

By Mr. Gibson:

Q. Now, Mr. Borst, in order to get our record clear, what do you understand that I asked you to check your records for?

A. The first item would be the labor turn-over for the boilermakers craft. I found that to be twenty-four per cent.

Q. I was asking for the number of people that you had on [658] the boiler payroll that started, and then dropped off the payroll before you terminated their work. The payroll shows that you laid off eleven men on October 11th, and then on the 21st of October something like fourteen people's services were terminated—they may have been terminated a day or two before that time, but so far as the payroll is concerned, at the right of the sheet—in the right hand column after the word "Term" which, no doubt," terminated, it shows the date their work was terminated. Is that correct?

A. That is right.

Q. Now, Mr. Borst, you speak in terms of percentage. Let me ask you: Have you a list of the men who dropped off your payroll?

A. Yes; there are fifteen who dropped off the payroll.

Q. You are including the boilermaker helpers?

A. Yes, sir.

Q. The men who you expect to control the work, or to run the job, are the boilermaker superinten-

(Testimony of W. Lyle Borst.)

dent and the lead men—the helpers simply tote the material?

A. No; that is not true. The boilermaker's helper in the craft do just as much as the others, except that they are restricted from that pay allowed the boilermaker until they settle their relationship with the Union.

Q. Have you segregated your record to show the number [659] of boilermakers that terminated their work, as distinguished from boilermaker helpers? A. No; I have not.

Mr. Watts: We are prepared to give the names.

Q. (Mr. Gibson, continuing:) You haven't a list of boilermakers who terminated their employment from August 6th until you discharged them?

A. I have names, but I would have to go back and make the differentiation to show which classification it would be under.

Q. Would you recall as to which ones were boilermakers? A. No; not from memory.

Q. I will try to help you, Mr. Borst. How about Sam Manato? A. I have that name.

Q. He just worked a short time?

A. Yes, sir.

Q. Possibly a couple of payrolls?

A. Yes, about that.

Q. Now, how about Selva H. Green?

A. I remember the name.

Q. Was that a man that you have terminated his employ—he was there about six or seven weeks?

(Testimony of W. Lyle Borst.)

A. Yes, I have the name "Green," who would be terminated. [660]

Q. You didn't indicate in this instance where the man was terminated, or when, but it shows that he received no pay, so that when he was terminated in the middle of the week the payroll shows the date he was terminated?

A. It shows the days that he worked.

Q. Did you find where the name did appear there, and there was no record of his having worked? And no record of termination?

A. His name was on the payrolls, even though he didn't work. You see a man might have just gotten his last check and then didn't come back.

Q. And on payroll after payroll his name would be carried on? A. Yes, it is possible.

Q. And that happened with Selva H. Green, did it not?

A. I think so, but I don't remember exactly.

Q. Alvin L. Robertson—he terminated on the third of September?

A. Yes; he was terminated.

Q. As of the payroll of September 3rd, wasn't it? A. Yes; that is right.

Q. And Nelson Neicer, the record shows that he terminated on September 20th; is that right?

A. Yes; that is right, but I have the name here as "Napier," September 20th is the right date.

Q. Now, Mr. Borst, what do you understand by labor turn-over—what do you understand that term to mean?

(Testimony of W. Lyle Borst.)

A. Well, expressed in percentage the labor turn-over would be the number of men employed who left the job before they were terminated, divided by the total number of men on this entire job, that is, in the classification.

Q. That is the method you used to arrive at the figure, and that is the term "labor turn-over" as expressed by you? A. Yes.

Q. It is termed labor turn-over where he is working and his services are terminated, and you replace him, but if you continue without him do you consider that as turn-over? A. No, sir.

Q. Now, with the exception of the four names that I have read—oh, yes, and also Mr. Biggs, Edward A. Biggs terminated on November 2nd?

A. Yes, sir.

Q. Immediately after he was terminated you moved Mairs into his position? A. Yes, sir.

Q. Now, that was turn-over. You needed a man to replace him?

A. Yes; that was the lead man's job.

Q. You needed a man in that place, and he was replaced? [662] Now that is what I understand by labor turn-over. If you hadn't replaced him it would mean that the services were not required by you?

A. Yes; that situation was comparable to other instances—and those instances are easily determined.

Q. Outside of the four names that I read, plus the name of Reckline, and he was on the payroll

(Testimony of W. Lyle Borst.)

of August 6th and August 13th—now, with the exception of those men the rest of them on the boiler job stayed straight through?

A. I have here the helpers, as well.

Q. Now, on the helpers, something like seven of them that you developed stayed with you through the whole time—the balance of them came and went as you needed extra helpers. The balance of the crew were diminished and increased as you needed helpers?

A. I don't differentiate between the two classifications.

Q. Do I understand that your view is that the helpers, so far as breaking in a new crew was concerned, from one boiler to another, the increase of efficiency and so on, the boilermaker's helper was just as much a part of that crew in regard to efficiency as the men directing the operation?

A. They were working the same as the boilermaker, side by side. We are taking the entire crew into consideration. [663]

Q. Are you prepared now, or in a position to answer, whether, with the exception of the five names that I have read, all of the rest of the men stayed on the payroll from the time you took them on until you yourself terminated their services?

A. I could give you the names of the men from this record that I compiled who were not discharged, and who left the work—there are fifteen of them.

(Testimony of W. Lyle Borst.)

Q. And that includes the five names that I mentioned, and the rest would be helpers?

A. I haven't checked that, but I could do it.

Q. And from your compilation, or your checking, you arrived at the percentage of twenty-four?

A. That is right.

Q. And if I read the names of the men now you would not know whether they were helpers or boilermakers—you didn't pay enough attention to know whether they stayed through from the time you hired them until you terminated their employment?

A. I have the names of the people who were turn-over people.

Q. But you have a different view of turn-over than I have, Mr. Borst. My understanding is that when a man leaves your employment and you have to put another man in his place [664] that is turn-over, but when a man just drops out of the service and is not replaced that is a reduction of forces, and is to be expected. It is an expected hazard of any employment, but as I gather it that is not your view of turn-over?

A. Turn-over, as viewed from this situation, represents the number of men who leave the employment voluntarily. They ask for releases on the basis of sickness or something else, and it could be a justifiable release, but it is all men that leave the employment before we were ready for them to leave, and we would have used them continuously

(Testimony of W. Lyle Borst.)

if they had seen fit to stay. Those are all turn-over men.

Q. Your record is not segregated so you know just the number of boilermakers you had at any one time? A. No, sir.

Q. How long would it take to look the record over and see if out of the thirty-three boilermakers you had on August 6th—no; I believe it was on August 13th, and see if out of that group you lost only four by voluntary resignation, whose employment was terminated?

Mr. Watts: He and I worked on this until one thirty.

The Court: It seems to me it is a simple question, and I think Mr. Borst could answer that?

A. I don't know which fall in the boilermaker class and [665] which fall in the helper class. We would have to determine that first, in order to answer the question, and we would have to go back through and check.

Mr. Watts: Isn't it a fact, Mr. Borst, that the helpers perform the same work as the boilermakers?

The Court: That was not the question, Mr. Watts. I believe the question was, How many boilermakers terminated their services without being discharged. Now, if you don't have that information, just say so.

A. By going back through these records I can get this information.

The Court: Well, I guess perhaps you had better

(Testimony of W. Lyle Borst.)

do that. We have had time for everything else. I think we will take time for that.

Q. (Mr. Gibson, continuing:) Was there anything else you were going to look up? Was there any other item you were going to check?

A. We made a determination of the absenteeism.

Q. Was that with reference to the boilermakers?

A. Yes; and the helpers.

Q. All right. Do you have that?

A. Yes; we found that to be five and one-half per cent.

Q. Including both the boilermakers and the helpers? A. Yes, sir. [666]

Q. Now, Mr. Borst, so that we understand each other, I would like the greatest number of boilermakers at any one day, or I would like the day, or date that you had the greatest number of boilermakers, plus the total number of names—and you will find there are five of them—that were not on the payroll, that did not continue through until you terminated them, that is, of the boilermakers and helpers?

A. I think I can give that to you.

Q. Did you continue with all of the boilermakers except the five—did they continue through? I believe sometimes you had around twenty or twenty-one—that was about the most you had at any time?

A. That is right.

Q. Now, out of that group you lost seven that started with you, which were terminated at differ-

(Testimony of W. Lyle Borst.)

ent times, and you also terminated some helpers as soon as you didn't need them any further?

A. We didn't keep that record.

Q. Isn't there some rule, Mr. Borst, that you are permitted to have so many helpers to so many journeymen?

A. They allowed us to have all that were available on that job.

Q. I understand that they only allow one helper to two boilermakers, but no such rule obtained on this project?

A. That is right; no, sir, we had all that we wanted. [667]

Q. Now, Mr. Borst, let me ask you: Is Mr. Conkey the head of the active operation of Fegles Construction Company?

A. Yes, sir; he is the head.

Q. Mr. Fegles is away most of the time?

A. Yes, sir.

Q. And the next in the organization was Mr. Conkey? A. Yes, sir.

Q. He supervised the work?

The Court: I don't think there is any question of who was in charge of the Fegles Construction Company here.

Mr. Gibson: Very well. I will not follow that further.

Q. (Mr. Gibson, continuing:) I think you checked your record as to Mr. Manatom, Mr. Green, Mr. Robertson and Mr. Napier? A. Yes.

Q. And determined that they terminated their

(Testimony of W. Lyle Borst.)

services prior to the time that you terminated it, and Mr. Reckline also. He only worked a short time?

A. Yes; he only worked a short time.

Q. Now, Mr. Borst, will you go over that record and tell me whether any of your boilermakers terminated their services prior to the time you terminated them? A. Yes, sir.

Mr. Scholz: May I ask a question? [668]

The Court: Yes.

Examination by Mr. Scholz:

Q. Mr. Borst, you testified that you understood that for any materials missing, or short, that you were to make a requisition through Mr. Joslin?

A. Yes, sir.

Q. And one of your claims was because of delay caused by defective parts and tubes?

A. Defective parts.

Q. Well, the tubes, some were defective; a part of the claim was that you were delayed because of those being defective? A. Yes, sir.

Q. Those tubes were patented?

A. Those tubes—water-wall tubes; yes.

Q. By whom?

A. The Combustion Engineering Company.

Q. Were they the only ones that could furnish them? A. Yes, sir.

Q. You knew that before you made your bid?

A. Yes, sir.

Q. Now, referring to the defective parts, that is covered by Article Three on page 8-B of the con-

(Testimony of W. Lyle Borst.)

tract, next to the last line on page 8-B, which says: "Provided that the right of the [669] subcontractor to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subconstructor, including, but not restricted to, Acts of God, or of the public enemy, acts of the constructor, acts of the Government, including, but not restricted to, any preference, priority, or allocation order, acts of other contractors or subcontractors in the performance of contracts or subcontracts with the Government, or the constructor, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of the subconstructor's subcontractors due to such causes. In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension." If there were any works there by other contractors or subcontractors, Mr. Joslin had nothing to do with that part? A. No, sir.

Q. And if there was work of the prime contractors, the Combustion Engineering Company, he would have nothing to do with that?

A. Yes; he was the supplier.

Q. You knew that at the time?

A. Yes, sir. [670]

Q. If there was work of other contractors delayed you made that fact known to the contracting

(Testimony of W. Lyle Borst.)

officer and he in turn would extend your time: isn't that your interpretation of the Article?

A. I am a little confused at the moment, but I will say yes.

Q. Now, I will refer to page 6-4 of the contract, to paragraph ten, and it states: "The manufacturer of the boiler equipment will furnish without cost to the subconstructor a consulting superintendent who will aid the subconstructor in the erection of their equipment," and then it goes on, "and on page 6-6 of the contract, in reference to the water-wall tubes it provides: "The furnace sides, front, rear, roof and gravity ash discharge from bottom shall be water-cooled with manufacturer's standard design. The surface of water-cooled furnace envelop is sufficient in area and proper location about the furnace gases to reduce their temperature,—" that was not just what I had in mind, but, however, you knew, Mr. Borst, before you made the bid that all these matters were in the specifications? A. Yes.

Q. Did you consult with the manufacturer of the boiler equipment in regard to your bid?

A. No. [671]

Q. Did you consult with them after you made the bid?

A. Their representative came on the job and naturally we did work with them in carrying out the work.

Q. How soon did the representative of the manufacturer come on the job after the job was awarded to you? A. About ten days.

(Testimony of W. Lyle Borst.)

Q. That would be around the eighteenth or twentieth of July, 1944?

A. Yes; I presume about that time.

Q. Anyway, the latter part of July?

A. Yes, sir.

Q. Did this representative come in voluntarily, or did you request him?

A. He came on voluntarily. We did not have to make a request for his appearance.

Q. If you had requested that before you made your bid, and had had a consultation with him, that would have given you the benefit of his knowledge?

A. I don't see right now what knowledge he could have imparted.

Q. I will ask that the question be read to you, Mr. Borst.

(Whereupon the following question was read by the Reporter: "If you had requested that before you made your [672] bid and had had a consultation with him, you would have had the benefit of his knowledge?")

A. Yes; we would have had the benefit of that, if we had talked to him.

Q. You also at times after you started work had five or six other experts on different phases of this contract of this work?

A. What was that question, Mr. Scholz?

Q. You also at different times after you started the work had the advice of five or six other experts on different phases of this work?

A. Advice from other people?

(Testimony of W. Lyle Borst.)

Q. That you could call for, yes, on different phases of the work?

A. The only one we could call on for advice was the engineer, Mr. Neubauer.

Q. On that construction work you had several experts that you could call upon while you were constructing the work?

A. In my own organization, I did.

Q. Outside of your own organization,—some of the different companies sent out representatives?

A. Yes; representatives came out in connection with the ash handling equipment. They came to check the installation [673] after it was made. That was a part of their service.

Q. And there were other experts came out on different phases,—in other words, a list was sent by the A.-E.-M. and the various manufacturers of people that you could call upon?

A. Yes, sir; we did have the soot blower people, and the ash handling people.

Q. You had this assistance?

A. Yes, sir.

Mr. Scholz: That is all.

The Court: Now, I would like to ask you a question, Mr. Borst: When did you first advise Mr. Joslin that you were claiming damages for failure to provide this material?

A. The actual claim as such was put in some time in February, 1945, the first actual claim for extra remuneration.

(Testimony of W. Lyle Borst.)

The Court: When did you first advise him that you were going to file that claim?

A. I don't think there was ever any definite advice, or statement, at any time that we would file a claim.

Mr. Scholz: I asked that question once. The first time was in December, 1945, which was a letter to the defendant.

The Court: That is all I have to ask the witness. [674]

Mr. Scholz: Inasmuch as the payrolls are mentioned here, I have certified copies of the payrolls and I offer them in evidence.

The Court: Do you have any objection to them, Mr. Watts?

Mr. Watts: None at all, your Honor.

Mr. Gibson: Defendant's Exhibits J, K, and L are offered.

(Whereupon documents referred to were marked Defendant's Exhibits J, K, and L for purposes of identification.)

Mr. Gibson: One page was torn off and I put it [675] in the Exhibit.

The Court: They may be admitted.

(Whereupon Defendant's Exhibits J, K, and L, so marked for identification, were admitted in evidence.)

The Court: And you may proceed with the cross examination of the depositions.

Mr. Scholz: I am now referring to cross examination of Eustis C. Clay, and to refresh your

Honor's recollection as to who he was, on direct examination he testified that he was employed by the Hercules Powder Company, Sunflower Ordnance Works, as Chief Expediter and Assistant Purchasing Superintendent. I am referring now to page twenty-four of the cross examination.

DEPOSITION OF EUSTIS C. CLAY

a witness for the plaintiff, deposed as follows:

Cross Examination

Question: I will ask you, Mr. Clay, if requisitions issued by the Power Service Corporation to the Hercules Company for materials were expedited by your office at the earliest possible delivery?

Answer: I never saw any requisitions from the Power Service Corporation.

Mr. Scholz: And now I go to near the end of the page:

Question: But if any such purchase orders had been issued [676] you would, of course, have expedited them for the earliest possible delivery, because you were in a hurry for this material, if you had got any order?

Mr. Watts: May I interpose this statement: Counsel has omitted several questions. The point I make is that he should not skip the questions that explain the answers. The questions and answers are referred to, and are:

“Question: You say there were none that you ever saw?

(Deposition of Eustis C. Clay.)

“Answer: None that I ever saw.

“Question: Were there any purchase orders issued by the Hercules Company that you recall?

“Answer: Purchase orders for what?

“Question: Any kind,—especially these tubes?

“Answer: There were no purchase orders issued for tubes, because they were contained in the original purchase order.”

Mr. Scholz: Now, I will proceed.

Question: But if any such purchase orders had been issued you would, of course, have expedited them for the earliest possible delivery, because you were in a hurry for this material, if you had got any orders?

Answer: If I had got an order, and it had been of [677] high urgency and required high priority, we would have instituted the proper method to procure that priority; yes, sir.

Question: Now, you say that Smith informed you that there was a shortage of materials, but at the time you had this conversation with him he didn't know what it was?

Answer: That is correct, sir.

Question: And also that he couldn't tell what it was until they did make an inventory?

Answer: That is correct.

Mr. Scholz: Now, I will skip down to about the middle of the page,—let's see,—I skipped one, two, three questions.

Question: With this pile of material that there was, there wasn't any way of determining just what

(Deposition of Eustis C. Clay.)

the shortages were until they did make such an inventory; is that correct?

Answer: Originally, the assumption was that it had all been delivered.

Mr. Scholz: And Mr. Joslin made a statement in there as follows: "That doesn't answer the question." And then the answer continues:

Answer: But, as I learned from Mr. Smith, it was customary to make sure that transfer of materials out of that stack of stuff to other parts of the plant where it might have been needed might show up a shortage. [678]

Question: But as a matter of fact, nobody could know for sure whether there was a shortage until you had actually,—somebody had actually made a physical inventory of materials that were there?

Answer: I presume that is correct.

Mr. Scholz: Now, unless there is an objection, I will jump to page twenty-nine, ten lines down the page:

Question: Did you ever receive a schedule prepared by the Power Service Corporation?

Answer: No, sir.

Mr. Scholz: I will skip the next question.

Question: Had you ever heard that a schedule was prepared by them as approved August 22nd, 1944?

Answer: No, sir.

Question: Did you ever see any directive that was sent to proceed with the completion of Power House No. 1?

(Deposition of Eustis C. Clay.)

Answer: Not to my recollection.

Mr. Scholz: Now, I will skip over to the next page, page No. 30, the second question on that page:

Question: Now, do you believe that it would have been possible in any way to secure these tubes at any earlier date than you actually did get them?

Answer: So far as I know, it would not.

Mr. Scholz: That is all of the cross examination [679] I care to introduce.

Mr. Gibson: That is all of our cross interrogatories.

March 27th, 1947, 11:05 a.m.

Mr. Gibson: Last evening I went through the cross examinations on these depositions and tried to clean out from the record everything that I didn't think was explanatory. Now, the first is the cross examination of Emil Nelson. He was the construction superintendent for the Power Service Corporation. The part I am reading starts at the bottom of page No. 16 of the deposition, which also contains his direct testimony.

DEPOSITION OF EMIL NELSON

a witness on behalf of plaintiff, deposed as follows:

Cross Examination

Question: And your general duties were what? Would you say?

Answer: Supervising erection and taking care of all the labor.

(Deposition of Emil Nelson.)

Mr. Gibson: Now, I will skip to the lower part of page eighteen:

Question: Did you participate in the making of the inventory by checking materials on hand at this Ordnance [680] Plant site?

A. I was supervising that.

Question: You were supervising that?

Answer: So I had a man checking it.

Question: So that you were really in charge then of that particular job?

Answer: That is right.

Question: Did you keep a record when the so-called inventory check-up was commenced?

Answer: Well, that was at first, as soon as the job started, we started, yes, sir.

Mr. Gibson: I am now continuing at the top of page nineteen:

Question: And that would be about the first work that you were assigned to?

Answer: That is right. One of the first things I started with.

Question: And can you state as to whether such inventory was completed?

Answer: Oh, I would say it took us about thirty days before it was actually completed, all of it. That means valves, and other things, besides what belongs to the building.

Mr. Gibson: Now, I am skipping from page nineteen to page twenty-eight: [681]

Question: After the tubes and headers were delivered, was the force of the plaintiff company in-

(Deposition of Emil Nelson.)

creased to take up any slack because of the delay in delivering such material?

Answer: Well, we put additional men on; yes, sir.

Question: Would you say now how many additional? Answer: I don't remember; no.

Mr. Gibson: That is all so far as Mr. Nelson's cross examination is concerned. I am now taking up the deposition of Mr. C. Howard Murphy. The Court will recall he was employed by the A.-E.-M.

DEPOSITION OF C. HOWARD MURPHY,

a witness on behalf of plaintiff, deposed as follows:

Cross Examination

Question: If your answer to Interrogatory No. 5 is that you did something in connection with the specifications, then who directed the preparation of the specifications for the erection of Boilers in Power House No. 1?

Answer: J. S. Hagan, Chief Engineer of the A.-E.-M. Engineering Division.

Mr. Gibson: That is all of Mr. Murphy's cross interrogatories; and now I go to the cross examination which I wish in the record of L. J. Neubauer. He was first employed by the Hercules Powder Company and later on by the A.-E.-M. [682]

Mr. Watts: That is correct.

Mr. Gibson: Starting on page ninety:

DEPOSITION OF L. J. NEUBAUER,

a witness on behalf of plaintiff, deposed as follows:

Cross Examination

Question: And what time in 1944 did you get to the Sunflower Ordnance Plant?

Answer: I came in July.

Question: What time in July?

Answer: I think it was about the middle of July, about July 15th.

Question: Would your records show?

Answer: Yes; I think they would.

Question: Up to that time you hadn't been working on the site of the Sunflower Ordnance?

Answer: No.

Question: And then you wouldn't know what material there was on hand for these boilers, would you, at that time?

Answer: No, sir; I would not.

Question: It wasn't a part of your responsibility, was it, to check by inventory, or otherwise, the amount and nature of such material?

Answer: No, sir; it was not.

Question: Is it your claim that you saw,—I believe you [683] said, three sheets of paper that represented material that was short?

Answer: Yes, sir.

Mr. Gibson: I now go to page ninety-four:

Question: Now, as to how much of the material which may have been on hand at the time the standby order was given and how much material there was on hand at the time that the bids were opened, you wouldn't know, would you?

(Deposition of L. J. Neubauer.)

Answer: No, sir.

Question: And as to how much of that material was on hand when the contract in that case was let, would you know?

Answer: No: I would not know.

Mr. Gibson: The purpose of offering this is to clear up some rather broad statements made by this man in direct examination. He did not even go on the job until after the contract was in force. That is all of Mr. Neubauer's cross examination I wish in the record. The next is the cross examination of Mr. F. V. Wedlick. He was the Project Manager for Cory-Joslin, the defendant in this action, and acted during the absence of Mr. Joslin. On page No. 7 of the cross interrogatories,—and I am starting at question No. 8:

DEPOSITION OF F. V. WEDLICK,

a witness for the plaintiff, deposed as follows:

Cross Examination [684]

Question: Did Mr. Borst present to you the clause which was finally added to the contract before it was formally executed?

Answer: I don't remember.

Question: If your answer to this question is "yes," were you advised by Phillip A. Dergance, attorney for the general contractor, that this clause did not add anything to the contract?

Answer: I was so advised.

Cross-interrogatory 9-A: If you were so advised, did you sign the additional clause based upon this advice? Answer: Yes.

Mr. Gibson: That is all with reference to Mr. Wedlick. I am now about to read from the cross examination of Colonel E. E. Taylor, who was the Area Engineer for the contracting officer at the time the proposals were being compiled, and the specifications arranged and the bids requested. The second question on page fifty:

DEPOSITION OF COL. E. E. TAYLOR,

a witness for the plaintiff, deposed as follows:

Cross Examination

Question: Did you have anything to do with the acceptance of the bids? Answer: I did.

Question: And at that time the Cory-Joslin-Macnsons were [685] contractors on that project of a large number of buildings; is that right?

Answer: They were the Fixed Fee contractors for the mechanical work.

Question: And the determination that Power House No. 1 was to be sublet was a matter not left for their determination; is that right?

Answer: The determination was made by me after consultation with Cory-Joslin and with the A.-E.-M.

Question: And I believe you testified that this construction of Power House No. 1 was such that it would readily lend itself to construction at a lump sum, or unit, basis; is that right?

Answer: I believe I testified that the installation of the boilers and equipment in Power House No. 1 was such that it lent itself readily to a lump sum unit price contract.

(Deposition of Col. E. E. Taylor.)

Mr. Gibson: The United States Attorney's office took this deposition on behalf of the defendant. I will continue with the next question:

Question: Up to that time whose responsibility was it to furnish the materials for the project as a whole? Was that the Hercules, or the Combustion Engineering Company?

Answer: When you refer to the project as a whole, do you refer to the power house?

Question: Power House No. 1. [686]

Answer: It was primarily, as far as I was concerned, it was the responsibility of Hercules to furnish the material, and they, in turn, had a contract with Combustion Engineers for the materials.

Mr. Gibson: Skipping to page fifty-two, toward the bottom of the page:

Question: Who did you say is the one that prepared the specifications for this subcontract?

Answer: I would say that the specifications were prepared by the Engineering Section of the Architects, Engineering, Managers Office.

Question: And did you collaborate in connection with the provisions, the phraseology, or any feature of these specifications? Answer: Yes.

Question: Had the specifications been agreed upon at the time that bids were requested?

Answer: Yes, I am sure they were.

Mr. Gibson: And now continuing with the cross examination toward the top of page fifty-four of the deposition:

Question: Did you collaborate in connection with the wording of this paragraph (b) of 5-04?

(Deposition of Col. E. E. Taylor.)

Answer: I can't say that I can remember that I collaborated in any particular paragraph in these specifications. I had [687] collaborated in the preparation of the specifications as a whole.

Question: Would that also be true of the paragraph following, which is designated as paragraph (c)? Answer: That would naturally follow.

Question: And in connection with the submission of bids, were specifications furnished to parties from whom bids were solicited?

Answer: They were furnished to all bidders.

Mr. Gibson: I am now turning to the bottom of page fifty-seven:

Question: Was there any consideration given by you when these specifications were prepared as to the length of time that the contractor would have after receipt of a requisition for materials within which such materials shall be supplied, or delivered?

Answer: No specific time. The project was considered as a whole, and it was considered that one hundred twenty days would be ample time in which to expedite the materials and get it on the job.

Mr. Gibson: And now the next question is toward the bottom of page fifty-eight:

Question: Are you familiar with the type of construction involved under this contract as to whether or not the installation of tubes and headers are of the most essential items, and [688] first needed after the boiler steel is erected, and the drum set in place?

Answer: I would say that they were.

(Deposition of Col. E. E. Taylor.)

Question: Would it then be reasonable to expect that the tubes and headers would be the first items inventoried and requests issued for any material found to be missing?

Answer: I would assume that that would be among the first items to be requisitioned if found to be missing.

Question: Would you say on a project such as this that after the drums, tubes and headers were in place and all of the material on the job was available that there could be any reasonable excuse for the subcontractor failing to maintain his construction schedule thereafter?

Mr. Gibson: There is an objection in the record by Mr. Watts which I will read:

"Mr. Watts: I object to that as argumentative, and based on no facts in the record in this case, and calling for a conclusion of the witness, too."

Mr. Watts: I will withdraw that objection, if the Court please.

The Court: Very well. He may answer.

Answer: It would all depend on whether those materials referred to were on the job.

Question: I mean after they were on the job and installed [689] from that time on, and all materials required were on hand?

Answer: It would still depend on how much of his scheduled time had been used up in securing those materials, and how much of his scheduled time was left in which to complete the job.

Question: And if his scheduled time was less

(Deposition of Col. E. E. Taylor.)

than had been formerly anticipated, and the time limit of one hundred twenty days was of importance, would it be natural that the force would be increased to expedite the work that remained?

Answer: It would be necessary to increase the force in order to accomplish it.

Mr. Gibson: Now, I am skipping from page sixty to page sixty-five: This is redirect examination that I am reading from,—and do you have any objection to my reading it?

Mr. Watts: I have no objection to the direct examination, the cross examination, or the redirect examination.

Mr. Gibson: Very well, I will read this. I have just this one question I would like to read:

Question: Colonel Taylor,—or, Mr. Taylor, on cross examination inquiry was made of you about the time it would take for tubes and headers to be delivered after order was made. State whether or not it was the intention of all parties concerned at the time the bid was made, or the understanding that the tubes and headers were already at the site, and were not to be ordered, or fabricated thereafter? [690]

Answer: I don't remember that any contention was made as to just what materials were missing.

Mr. Gibson: That completes all of that part of the testimony of Colonel Taylor that I wish to read. That completes all of the testimony I offer. Now, my recollection is that you have not offered the deposition of the Vice-president, Mr. Conkey?

Mr. Watts: No; there were only a few questions in that.

Mr. Gibson: Then that is all at this time.

Mr. Watts: That is all. The plaintiff rests.

The Court: Do I understand now that the plaintiff has rested as far as his case in chief is concerned, except for the answer to one question from Mr. Borst?

Mr. Gibson: I think there were two questions that he was answering after he had checked on certain matters.

The Court: Very well.

Mr. Scholz: We want at this time, if your Honor please, to renew our motion for judgment on the pleadings. We filed the motion for judgment on the pleadings, and Judge Roche denied it without prejudice. We renewed it at the beginning of the trial, and your Honor took it under advisement, and we want to renew it at this time, and we want also to make a second motion for a non-suit, and in stating the grounds for [691] a motion for a non-suit, I shall make it as brief as I can. On June 14th the Power Service Corporation received the specifications and an invitation to bid on this job. On June 18th and 19th, I believe it was,—at any rate, it was a part of two different days that were spent by Mr. Borst in a physical inspection of the project on which to base a bid. He was accompanied by two members of his organization to the site of this project. On July 7th the bids were submitted by the Power Service Corporation. On

July 11th the contract was awarded. That is the date of the contract. On July 13th Notice to Proceed was received by the Power Service Corporation. Now, we believe that is practically the story. There was an offer and an acceptance which constitutes a contract. Under the specifications which the plaintiff had prior to the making of this bid, and upon which the bid is based and upon which it was accepted by the defendant here, the plaintiff acknowledges in paragraph 1-05 of the specifications, and it was fully understood, that any delay encountered by reason of late delivery of material that Joslin, the defendant, would not be held for any expense because of any increase in the time of completion of any of the work, and in turn, the contract does not say that the plaintiff would be penalized for any delay,—

The Court: (Interposing) Now, would you just [692] confine yourself to placing the motion in the record without any argument at this time? I will hear argument on all of these questions later.

Mr. Scholz: Very well. The grounds for the motion are:

First: That there is no evidence adduced to show any breach of contract by the defendant;

Second: That the plaintiff is barred from any claim for damages as alleged in the complaint;

Third: If he is not barred by the specifications, Paragraph 1-05, then he is barred by the additional clause on the contract;

Fourth: There is no consideration for the ad-

ditional clause on the signature page of the contract, which was later added;

Fifth: There is no ground for a reformation of the contract. It is agreed that there is no fraud involved. It is my understanding that it is based on mutual mistake, and there is no evidence here of any mutual mistake, or mistake of one party which the other knew about. I will say further that there is no ground for the reformation of this contract because there can be no mistake if the parties understood,—

The Court: If you have finished with the grounds [693] of your motion, Mr. Scholz, I will say that at this time it is my inclination to overrule this motion and take the testimony on behalf of the defendant, because I would like to give this matter serious thought.

Mr. Scholz: I was just going to say that the mistake must be such that the parties could not have obtained knowledge thereof when put on inquiry, and that any mistake must relate back to the time of the instrument,—that the instrument says one thing when the parties intended it to express another; that carelessness, negligence is no ground for reformation. That the contract did not assure the plaintiff that it might not be delayed due to causes outside of the contract, nor do acts of the Government constitute a breach of the contract as to this defendant, and that the plaintiff did not show here that he was diligent, and he did not show why he did not avail himself of the sources of which he had knowledge, nor does he show that he could

have obtained this knowledge by reasonable diligence, had he investigated. It is admitted that there was no misrepresentations made by the defendant,—

The Court (Interposing:) I will say to you, Mr. Scholz, that I consider there are some very interesting questions raised by the motion, and in order that the Court may have ample time to consider this the motion at this time will be over-ruled. [694]

Mr. Gibson: May I say,—

The Court: Do you wish to argue this matter now, Mr. Gibson? I am limiting my ruling at this time, and I will say that I am over-ruling this motion, and requiring the defendant, if it is the desire of the defendant to do so, to continue with their case, that is, with the defense to this complaint in its entirety, but I am doing this with the understanding that I am reserving the ruling to the extent that the motion may be renewed again at the close of the case if it is desired, and at that time the Court will, when deciding the entire matter, decide the questions that are raised by the motion. I would like to have the matter presented on briefs very fully. What I am trying to avoid now, is to make a definite ruling on this matter. I would like to hear fully from counsel in their briefs.

Mr. Scholz: The only reason I make this is to preserve our record.

Mr. Gibson: I think it is a very proper motion to be made at this time.

The Court: I feel the same way. I think it is a proper motion, and I think it has some nice ques-

tions presented, and I want to say this: I think if you gentlemen were in the Court's position you would want a full opportunity [695] to have all of these questions presented to you.

Mr. Gibson: That is true.

Mr. Watts: I agree with the Court on that.

Mr. Gibson: I assume that the motion made by Mr. Scholz is as to the three counts in the complaint, and I want to state that I have a particular ground, or, rather, would like to impress the particular grounds for the motion for judgment for the defendant on Count One, and to say that it is not only a renewal of the motion on the ground of failure of consideration for the clause added, but that the clause itself adds nothing to the contract. I think I understand that the interpretation placed on the contract by the plaintiff is that it is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials, notwithstanding the provisions of Paragraph 1-05 of the specifications. It is our contention that it adds nothing to the contract. If it is considered that it does add something to the contract by this clause, then, of course, there is no basis left in the contract for determining the delays, because the paragraph which they are objecting to is the only paragraph in the contract, or the specifications, that says anything about when it is to be completed, and it follows that without that [696] paragraph then there is no way to

make any determination as to whether there was a delay. It is defendant's contention that if you take this contract and say: "I am going to use this first part of the contract, but I don't like the rest of it,"—the time is fixed in Paragraph 1-05 as one hundred and twenty days. It seems to me that they cannot start from that point and calculate any damages, because, as I say, they cannot take the first part as a basis, or any basis of their contract and say, "I will accept that, but I don't like the rest of it." I am wondering, your Honor, if I have made myself clear on this.

The Court: I think you have, Mr. Gibson, and, as I said after Mr. Scholz' remarks, I would like to consider this matter fully. There are some nice questions involved, and I might say again, without any thought of finally ruling on this matter, I will keep my mind open, of course, but it seems to me that the contract as originally drawn, which includes the clause that is added to it, is very plain and complete, and I cannot right now see any necessity for any reformation of this contract. I think it is easily interpreted as drawn. Of course, I may change my mind on this. The only question that I have no thought at all on at this time is whether or not the contract was completed prior to the signing of it. It is understood by all of you gentlemen [697] now, is it not, that the motion is over-ruled, with the reservation that the Court will reconsider it in ruling on the matter finally, that is, in making a final determination of the entire case?

Mr. Gibson: That is understood by us; yes.

Mr. Watts: That was my understanding.

Mr. Gibson: We will call Mr. Joslin.

WILLIAM EDWARD JOSLIN,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gibson:

Q. Your place of business is where, Mr. Joslin?

A. 509 Polk Street.

Q. And your residence?

A. 611 Miner Road, Miranda, California.

Q. You are the defendant in this action?

A. Yes, sir; I am.

Q. You operated during the time covered by the allegations in the complaint filed in this matter under a fictitious name? A. Yes, sir.

Q. You operated as an individual under a fictitious name? A. I did.

Q. And what was that? [698]

A. Cory, Joslin & Macnsons.

Q. That is the name under which you operated?

A. Yes.

Q. But it is not the name under which you operate in San Francisco, is it?

A. I do not; no, sir.

Q. How did that become your operating name at the Sunflower Ordnance Project?

A. Well, the Macnsons Company was a local firm and prior to the Sunflower Ordnance job we

(Testimony of William Edward Joslin.)

worked as a joint venture on numerous jobs. At the time consideration was first given to the Sunflower plant in DeSoto, Kansas. I was called back for consultation. I proposed to take Macnsons in on that, and at the start of it, or during the negotiations Macnsons procured some additional work at San Diego which work prevented them from taking part in this project, so I took it in my own name.

Q. You mean you took the work individually?

A. Yes.

Q. Did Macnsons move out before the negotiations were finished?

A. Yes, but all of the stationery and so forth had been printed, and rather than cause the expense of reprinting the stationery we continued on under the name. [699]

Q. But you were the sole operator?

A. I was the sole individual concerned.

Q. You are identified, I believe, some place as the president of Cory, Joslin Company?

A. I am.

Q. They are not involved here?

A. They are not.

Q. What is your business?

A. Mechanical and electrical contractors, and contracting engineers.

Q. In 1942 what was your occupation or business at that time? A. The same business.

Q. Are you a member of, or associated with, any national organizations or societies?

(Testimony of William Edward Joslin.)

A. I am presently associated with the National Association of Master Plumbers; the National Association of Heating, Piping and Air Conditioning Contractors; the American Society of Sanitary Engineers; and the Society of American Military Engineers.

Q. Are you familiar with power house construction as it pertains to boiler construction?

A. I am.

Q. Will you state some of the jobs that you have had the [700] contracts for, or have worked on?

A. The power house at the Alameda Air Station; a power house at Fairbanks, Alaska; a power house at the Remington Arms Plant in Salt Lake City, Utah; and at Mare Island, and at Hunters Point, and at Alrock Field, Panama, and the power house at Sunflower, in addition to a number of others.

Q. Did you supervise any power house jobs other than those on which you had the contract?

A. Oh, yes; I have.

Q. Will you state some of those that were under your supervision?

A. Well, there was the Pacific Fruit plant at Nampa, Idaho; the Ford plant at Richmond, California; the LaGuna-Honda and the Handhome and others.

Q. Did you hold any designated position on these construction jobs?

A. On some of them I was general superintend-

(Testimony of William Edward Joslin.)
ent; on others I was superintendent of construction, estimator, and manager of the mechanical department.

Q. Are you familiar with the type of work connected with the installation of Power House No. 1 at DeSoto, Kansas? A. Yes, sir.

Q. In connection with the Sunflower construction, Mr. [701] Joslin, as a whole, you had a contract for certain phases of the work. Will you explain what this included?

A. The entire mechanical work, involving the heating and plumbing; all of the proposed piping; the power house installation, exclusive of the boilers. That applies to Power House No. 1 and No. 3, and as an addition to our contract the completion of Power House No. 2.

Q. When did that work take you to the Sunflower Ordnance Plant?

A. In April, 1942, I was first called back for negotiation, and we actually started the operation in May, 1942.

Q. Mr. Joslin, were you given practically a twenty-four hour notice to get a crew started there?

A. Yes; that is correct.

Q. I think some statement was made that the contract was dated some time in September of 1942?

A. Well, I don't know about the statement being made, but I think that is the approximate date. I know it was later than the date we started.

Q. You were first working on a letter of intention? A. That is correct.

(Testimony of William Edward Joslin.)

Q. You were not bidding on specifications similar to these involved here,—similar to this contract?

A. We were to operate under specifications prepared by [702] the A.-E.-M.

Q. This was a Lump Sum contract?

A. Yes.

Q. Will you explain a lump sum contract and a cost plus a fixed fee contract, as you worked on?

A. Yes. On a cost plus a fixed fee there is an estimate of the amount of work in dollars and cents that is to be included in the construction work, or in the contract, and on which there is a fee allowed to cover that work. That is based on a curve, or a chart. The fee is graduated down according to the volume of work included in the contract. Our contract first started at a fee of 1.37 per cent.

Q. That was the estimated cost of your part of it?

A. Of our contract, and that was decreased as the various additions came in. It was decreased to approximately seven-tenths of one per cent,—an average of about one per cent overhead.

Q. And what does that include?

A. Our home office expense involved in the particular services which are to be included, and which are not reimbursible items. The only reimbursible items are the employees' time and the merchandise purchased for the contract. A lump sum contract is a contract on which the bidder bids on specifications as submitted to him. He analyzes the specifications and prepares [703] his estimate and submits

(Testimony of William Edward Joslin.)
a bid for a lump sum figure. That is the difference in the two contracts.

Q. During the war because of the constant changes a great many of the contracts with the general engineers,—the A.-E.-M. were operated on a cost plus a fixed fee basis rather than a lump sum?

A. Well, we had numerous cost plus a fixed fee contracts; yes.

Q. Now, Mr. Joslin, in addition to the items not reimbursible, were you required to finance the payments until the Government reimbursed you?

A. Yes, as a part of our overhead we were compelled to finance on most of the jobs all of the merchandise purchased, and on all of the jobs we were compelled to finance the labor involved on which,—after paying the labor payroll we would apply for our reimbursement. The financing of the job was a part of our overhead.

Q. That was a part of your overhead?

A. Yes, sir; it was.

Q. And that was included as a part of these expenses under this figure which I believe you gave as 1.37 per cent?

A. That is correct.

The Court: I think we will recess at this time until two o'clock. [704]

2:00 p.m.—March 27th, 1947

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, in connection with the reimbursible expenses that the Government paid you was there a limit which you could pay for engineers?

(Testimony of William Edward Joslin.)

A. Yes, sir; a definite limit.

Q. Will you explain that?

A. Yes. The maximum amount they would allow us to pay as reimbursible items for engineers was \$6,000.00. I had one, a man named J. W. McCarty, to whom I paid \$10,000.00 a year. He was a regular employee. I had to pay him \$4,000.00 in addition to the amount allowed as reimbursible, and I had another man that I paid \$9,000.00, of which I paid \$3,000.00 out of my own pocket. At one time, for a considerable period, the source of steamfitters and plumbers working overtime were making more money than the plumbing superintendent and the mechanical superintendent, and in order to equalize the sums I had to pay them an additional amount of money. You see I had them down at these certain salaries. The Government would not permit this. You see this had to come out of the fee in addition to the financing of the job.

Q. I believe you said part of your contract was mechanical? A. Yes.

Q. Will you please explain what that included?

A. Well, that was exclusive of some sheet metal work. It included all mechanical equipment, such as pumps, compressors; power houses, with the exception of No. 1 and No. 3, we did all of the pipe work in No. 3, all of the heating and plumbing. There were literally hundreds of miles of proposed piping of all of the distribution lines,—the piping within the buildings was a very extensive project:

(Testimony of William Edward Joslin.)

in fact, in one order we had seven hundred and fifty thousand feet of pipe.

Q. Various kinds of pipe ran all over the plant?

A. The distribution lines throughout the entire area covering several hundred miles.

Q. And those were used for different types of chemicals and water?

A. Yes, sir. In fact, there were nineteen different types of water alone, and then there were acids and various chemicals.

Q. Mr. Joslin, calling your attention to the subcontract that is involved in this litigation, can you briefly state what transpired up to the time that the bids were submitted,—the calls for bids that were made in connection with this contract, the circumstances that led up to your subletting the contract?

A. My first knowledge of the fact that Power House No. 1 [706] was going to be placed in operation was a telephone call from the Project Manager, Frank Wedlick, who informed me the first part of June, 1944, that we had received notice to complete Power House No. 1. I told him at that time "The best thing you can do is to check up on the tube rolling equipment," which we had. I told that he would have to check up on this equipment and see that it would be available. About three or four days later he called me and said that they had decided to let the contract on a lump sum basis. I protested and asked Mr. Wedlick,—

Mr. Watts: (Interposing:) Just the conversa-

(Testimony of William Edward Joslin.)

tion between you and Mr. Wedlick,—just give us the conversation, your instructions to him, or whatever it was.

A. I instructed him on the telephone to go to the proper authority, which was Mr. Hagan, and tell him that it would be foolish to let that on a lump sum, that I was sure they would not get a figure less than one half million dollars, and I said, “We can do it, I believe, for \$375,000. I am positive we can do it for \$400,000.” Mr. Wedlick called me later and said that they insisted on letting it on a lump sum. My instruction was not to get involved in any contract that required him to specify, or that caused us to stick our neck out on what is there or what is not there, or anything about that contract.

Q. (Mr. Gibson, continuing:) After the contract proposals [707] or specifications were put out to the prospective bidders, to the Power Service Corporation, and after they had been accepted and were working on the job did the question come up with reference to the possible, or to the proposed modification of that contract by the Power Service Corporation? A. Will you state that again?

Q. Yes. After the contract and specifications were put out to the prospective bidders, and after the Power Service Corporation had been accepted and was working on the job, did the question come up with reference to a possible, or a proposed modification of your contract by the Power Service Corporation? A. Yes; there was.

(Testimony of William Edward Joslin.)

Q. Did that question continue on for that period of time up until about the first part of September, 1944? A. Up to about that time.

Q. And did you receive a communication from Mr. Wedlick the latter part of August in which he forwarded to you a copy of a letter from the Power Service Corporation dated August 22nd, which, I believe, is Exhibit No. 16, and ask for your instructions? A. Could I see that letter?

Q. Yes. And now, Mr. Joslin, will you see if you can identify that? I am showing you the original of the document [708] which was offered as Plaintiff's Exhibit No. 16. A. Yes, sir.

Q. Is that the letter sent to you by Mr. Wedlick in a letter of transmittal dated August 23rd?

A. Yes, sir.

Q. To which you replied? A. Yes, sir.

Q. When? A. August the 28th.

Mr. Gibson: I offer this letter in evidence as Defendant's Exhibit M.

(Whereupon the document referred to was marked Defendant's Exhibit M for purposes of identification.)

Mr. Gibson: The letter of August 23rd, 1944, from Mr. Wedlick is as follows:

"Mr. W. E. Joslin, Cory & Joslin, Incorporated
512 Golden Gate Avenue,
San Francisco, California.

"Dear Bill:

"Enclosed please find copy of Power Service Corporation's letter of August 22nd, 1944.

(Testimony of William Edward Joslin.)

"I am still of the opinion that we should not agree to this letter inasmuch as the Power Service Corporation's bid was based on the specifications.

"I would like your comments and criticism on the enclosed letter.

"Best regards

"F. V. WEDLICK."

To which under date of August 28th, 1944, the following reply was made:

"Cory, Joslin & Macnsons,
Sunflower Ordnance Works,

Post Office Box 36,
Kansas City, Missouri.

Attention: Mr. Frank Wedlick.

"Dear Frank:

"There is nothing we can do contrary to specifications, and as a result I am loath to put anything in writing that would in any way conflict with the specifications. Certainly, I am not privileged to say that disbursement would be made for increased costs. Consideration for extension of time due to non-delivery of essential materials would at all times be in order.

"I am not familiar with the legal phases involved but I am sure we must insist that the terms of the contract be met, and that any consideration for additional costs and extension of time must be submitted direct to others than ourselves for approval.

(Testimony of William Edward Joslin.)

This, of course, will [710] be separate and not a part of the contract which must be signed as is.

“Very truly yours,

W. E. JOSLIN.”

Q. (Mr. Gibson, continuing:) Are those the last instructions given by you to your Project Manager, Frank Wedlick, before the contract with the additional clause on it was signed and approved?

A. So far as I can remember.

The Court: If this has been offered and there is no objection, it may be admitted.

Mr. Watts: We have no objection.

The Court: Then it may be admitted in evidence.

(Whereupon Defendant's Exhibit M. so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Mr. Joslin, you know that a claim was filed which was finally referred to the Chief of Engineers by the Power Service Corporation in connection with alleged damages in the amount of ten thousand and eight dollars and thirty cents?

A. Yes; that is right.

Mr. Gibson: I am now offering Exhibit N, and

Q. (Mr. Gibson, continuing:) I will ask you if you can identify that. It is three or four documents that are tacked [712] together.

(Testimony of William Edward Joslin.)

Mr. Watts: We have no objection to their introduction.

(Whereupon documents referred to were marked Defendant's Exhibit N for purposes of identification.)

The Court: It may be admitted.

(Whereupon Defendant's Exhibit N, so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) You can identify them, Mr. Joslin? A. Yes.

Q. What are they?

A. This is a letter from the Chief Engineer, or, rather, a copy of a letter from the Chief of Engineers, Lieutenant General R. A. Wheeler. It is addressed to the Power Service Corporation, Wesley Temple Building, Minneapolis, Minnesota, and is dated the 12th of March, 1946.

Q. That is the letter which rejected the claim of the Power Service Corporation?

A. That is right.

Q. And attached to that letter is another letter. Will you identify that, if you please?

A. That is addressed to W. E. Joslin, Owner, Cory, Joslin & Macnsons, San Francisco, California, and is dated the 26th of [712] March, 1946, and that is signed by I. M. Hember, Chief, Contracts and Claims Branch.

(Testimony of William Edward Joslin.)

Mr. Gibson: That letter which was just identified by Mr. Joslin is as follows:

“Dear sir:

“Enclosed for your record is a copy of the decision of the Chief of Engineers made in connection with the appeal of Power Service Corporation under its sub-subcontract No. 5 with your firm at Sunflower Ordnance Works.

For the District Engineer,

Sincerely yours,

I. M. HEMBER,

Chief, Contracts and Claims Branch.”

And on the reverse side of the letter there is a blue stamp marked showing that this was sent on March 26th, 1946, from the United States Engineers Office, Kansas City, Missouri. That is according to the stamp on the reverse side of the letter.

Q. (Mr. Gibson, continuing:) Mr. Joslin, did that notice of decision of the Chief of Engineers arrive in your office, or did you receive it until sometime after the 26th of March?

A. It was after the 26th of March, 1946.

Q. Did you receive any notice of any other decision?

A. Yes. [713]

Q. About the nineteenth of March, 1946, did you mail to the Power Service Corporation a final check of the balance due them in the amount of \$1,000.00, which was subject to that letter?

(Testimony of William Edward Joslin.)

A. I did.

Q. And with that check was a letter of transmittal outlining and containing a series of receipts to be signed by the Power Service Corporation?

A. I think there was approximately five copies on which I requested signature. That was on our stationery and read as follows: "Payment in full, exclusive of outstanding claim of Power Service Corporation which has been submitted to the Chief of Engineers for decision." They signed my five copies and later included some copies on their own stationery with the same language that I incorporated on my stationery. All of this correspondence was later supplemented by additional correspondence. There was also a letter stating that this had been signed, not by the treasurer, but by the secretary of the organization, and asked if we would not include Mr. Gaffney's receipt in lieu of the previous one—

Q. (Interposing:) You have all these letters in your file?

Mr. Watts: I do not question that at all. [714]

Mr. Gibson: Very well.

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, attached to the letter which you read as Exhibit M, will you tell us what the pink slip is?

A. That is the copy of the check to the Power Service Corporation. We send the check with duplicate markings. We have two copies; one we file numerically and the other alphabetically.

Q. It is the form you use as a voucher—a form of check?

A. Yes, sir; it is.

(Testimony of William Edward Joslin.)

Q. The original goes to the payee?

A. Yes, sir.

Q. With a copy of the voucher attached?

A. Yes, sir; that is detached before cashing.

Q. You have the original check here?

A. Yes, sir.

Q. Showing that it was cleared through the bank and cashed? A. That is right.

Q. Now, at the time this letter was sent and the check was sent, you didn't know at that time that the Chief of Engineers had decided the appeal of the Power Service Corporation? [715]

A. I didn't know anything about it.

Q. The claim you referred to is the same claim that was filed with the Chief of Engineers, and is the subject matter of this litigation here today?

A. Yes, sir; that is the same thing.

Q. Except the difference in the amounts. This is for some thirty odd thousand dollars.

A. I am speaking of this claim that is attached here (indicating).

Q. After the contract with the appended clause had been executed by the Power Service Corporation and signed by your manager, Mr. Wedlick—

A. (Interposing:) Yes, sir.

Q. (Continuing:) I had not finished my question. A. Pardon me, Mr. Gibson.

Q. After the contract with this clause appended had been executed and signed, did you have a discussion with reference to the effect of the additional clause that was placed at the bottom of the signature page in that form contract?

(Testimony of William Edward Joslin.)

A. At a later date, you mean?

Q. Yes.

A. Yes, sir; I did.

Q. Was the circular emanating from Mr. C. H. Murphy, and which had the note attached by Mr. Dergance sent through [716] your office?

A. Yes, sir.

Q. And that was covering that clause?

A. Yes, sir.

Q. That is the document you have in your hand?

A. Yes, sir.

Q. And that is the one we are referring to now?

A. Yes, sir.

Mr. Gibson: I offer this in evidence.

(Whereupon document referred to was marked Defendant's Exhibit "O" for purposes of identification.)

Mr. Watts: I have no objection.

The Court: It may be admitted, and I think that will be Defendant's Exhibit "O".

(Whereupon Defendant's Exhibit "O" so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, I call your attention to what has been marked as Defendant's Exhibit O, and I will ask you if that is the document that you have reference to?

A. This is the same one; yes, sir.

Mr. Gibson: Exhibit I is as follows, and is dated September 5th, 1944. It is from C. Howard Mur-

(Testimony of William Edward Joslin.)

phy, subcontract manager, to P. A. Dergance, attorney: [717]

“Subject: Contract No. 5 to F.F. Subcontract No. 5, Power Service Corporation.

“Attached hereto for your review is a copy of the above described subcontract which has been signed by the subconstructor with the following qualification imposed on the signature sheet.

“‘This contract is signed and executed by the Power Service Corporation without any intent on the part of the Corporation to abandon or waive any right which it may have to submit, prove and collect damages by reason of the late delivery of materials notwithstanding the provision of Paragraph 1-05 of the Specifications.’

“The reference, Paragraph 1-05, was a part of the Specifications on which bids were taken, and has not been changed in any respect in the writing of the formal contract. As to this date this department has no information to the effect that actual damages have occurred, however, there exists items of correspondence from the subconstructor pointing out anticipated damages which could not now be computed even if they were determined to be payable under the terms of the subcontract.

“It is, therefore, our opinion that qualifications [718] which might alter the terms of the subcontract as it was originally written should not be written into the subcontract.

“Your opinion is requested with regard to whether or not the terms of the subcontract have

(Testimony of William Edward Joslin.)

been modified by the qualification, and with regard to the advisability of Cory, Joslin & Macnsons entering into, and the A-E-M approving the sub-contract in consideration of the existing qualification.

/s/ C. HOWARD MURPHY,
Subcontract Manager."

And there is appended to that the following:

"In my opinion the subject clause does not change the terms of the contract. It merely reiterates the right, if any, of the Corporation to submit a claim growing out of the situation with respect to materials."

And that is initialed "P. D." and dated 9-16-44, and there is in typing "Phillip Dergance."

Q. (Mr. Gibson, continuing:) Mr. Joslin, did you at the time this contract was entered into have any understanding with the **Power Service Corporation** that the specifications were to be interpreted in any light other than the wording of the specifications? A. I never did. [719]

Q. Did you at any time—at the time this contract was entered into or negotiated did you authorize your agent to sign any contract on behalf of you that would in any way alter the terms of the specifications? A. I did not.

Q. Now, back to the Power House, I understood that you had completed during the course of your work at Sunflower one of the power houses?

A. That is correct.

(Testimony of William Edward Joslin.)

Q. Which one was that?

A. That was Power House No. 2, and in addition to that we completed—

Q. (Interposing:) Just a moment, Mr. Joslin. Then I understand that nine months, or a year, prior to the date of the contract with the Power Service Corporation there was a directive order to cease operation on Power House No. 1—let me ask this: Had work started on Power House No. 1 prior to the cease-work order? A. Yes, sir.

Q. And were there other buildings placed in stand-by condition?

A. Yes, sir; a lot of them.

Q. What happens to the materials when these buildings are directed to be placed in stand-by condition? [720]

A. The material that has not been used, or put into the structure, when a building is placed in stand-by condition—and there were a number so placed—when we receive notice to place a building in stand-by condition we would go to the site and gather, or collect, all of the surplus materials and return them to our warehouse and use them on future construction.

Q. What do you mean—what warehouse do you mean?

A. I am referring to our materials when they were returned to our warehouse—**materials of other** contractors, they collected.

Q. And that would apply to what materials?

(Testimony of William Edward Joslin.)

Would it apply to all electrical material and such as that?

A. All of the A-E-M contracts, and the Hercules operators, all of their equipment would be gathered up.

Q. Was it the custom to make a list of the materials stored when a building was placed in stand-by condition?

A. No; we didn't make a list because when a building was placed in stand-by condition we assumed that it was permanently in stand-by condition.

Q. Well, let me ask this: What would be the recognized procedure after an order was received to complete a building which had previously been placed in stand-by condition?

A. Well, some buildings were placed in operation after [721] they were placed in stand-by condition, and at that time our engineers would go to the site and check off the materials and equipment installed up to the time it was placed in stand-by condition. After they checked them off they would take the plans and make a complete takeoff, eliminating that part which was installed and issue requisition to our warehouse for the balance of the material to complete that building.

Q. The statement was made here, Mr. Joslin, that the material which was not available at the Power House No. 1 itself was not available adjacent thereto. Now, can you state where your storehouse was in comparison to Power House No. 1?

(Testimony of William Edward Joslin.)

A. Yes. I heard that statement that the materials were stored five miles away. I want to say that I know of no warehouse that is five miles removed from Power House No. 1. The Hercules warehouse was on the main street facing Power House No. 2. I would say that was possibly three blocks, and that would be the first warehouse from Power House No. 2.

Q. In which some of the material might be stored?

A. A lot of it was stored in that, and Power House No. 1 was approximately three-eighths of a mile from Power House No. 2. Power House No. 1 was over here in this [722] location (indicating); Power House No. 2 was here (indicating) and Power House No. 3 over there (indicating), about three-eighths of a mile between each. To the best of my knowledge, I don't know any warehouse that would be in excess of a mile from Power House No. 1.

Q. Now, particularly in reference to the storehouse which you referred to as yours, what distance would that be from Power House No. 1?

A. Our warehouse at the time Power House No. 1 went into stand-by condition, I would say was a half mile from Power House No. 1. Later the A-E-M took over our warehouse and our shop was moved back into the area about two miles—about two and a half miles from Power House No. 1, but our warehouse was taken over by the A-E-M and remained in the same location.

(Testimony of William Edward Joslin.)

Q. Now, these materials that were referred to as being in adjacent buildings—you are familiar with the contract are you, Mr. Joslin?

A. Yes.

Q. This was referred to as being adjacent, and in fact, in the storehouse. Now that material was of a minor nature?

A. They were large warehouses.

Q. But the items of materials stored there as distinguished from the materials stored in Power House No. 1, what was the [723] nature of that?

A. Well, there was a block of equipment, such as boilers, fans, pulverizing equipment, steam generating equipment—was all practically in Power House No. 1. The valves, fittings and so on was in the warehouse, and the pipe was fabricated in Philadelphia and some of it was in the power house and some adjacent to it on the outside.

Q. Was there adjoining the power house a shed where some material was stored?

A. There may have been a temporary shed built there. I know some material was stored outside.

Q. Now, Mr. Joslin, you have explained the normal procedure when a building was taken out of stand-by as to some of the procedure followed. Let me ask you this: Would this material list, or inventory list—whatever it might be called—enable you to ascertain the shortage and to secure the necessary material to complete the building?

A. As soon as we made a material take-off or inventory of the materials not installed these requi-

(Testimony of William Edward Joslin.)

sitions would then be forwarded to our storehouse, or warehouse, and the material we could not supply would go to the Hercules people and if they didn't have it available we would purchase it outright.

Q. Now, assume that the list or inventory was made of any material which had not been used in the construction of the building when the stand-by order was issued, would that obviate the necessity of a physical inventory when the building was ordered back into construction?

A. No, sir; because that material was very frequently used elsewhere.

Q. Then even a short interval between the inventory and the time of the order putting it back into construction would not be a true inventory of the material which existed a few days later than the inventory?

A. Will you repeat that question?

Q. Even with only a short interval the inventory existing at the time of the stand-by order would not necessarily be a true inventory of the material existing a few days later?

A. No, sir, because it might be used if the necessity arose.

Q. And the reason inventories were not taken was because those supplies were taken up to general supply depots?

A. Yes, sir; that is right.

Q. And they were then co-mingled with other material of the same kind?

(Testimony of William Edward Joslin.)

A. That is right, and it might be requisitioned out the next day. [725]

Q. And if they were valves they would be put in with valves of the same type when they were taken up there?

A. That is right, they were: yes, sir.

Q. At the time the specifications were sent out, and at the time the bid was accepted of the Power Service Corporation, did you have any knowledge as to what materials were, or were not, available for the completion of Power House No. 1?

A. No; I had no information as to what was, or was not, there.

Q. You had no such information?

A. No, sir.

Q. Did you have any knowledge as to the absence of materials?

A. I had no knowledge of the absence or presence of materials.

Q. Were you under any requirement before the contract was let to the Power Service Corporation to inventory any part of the materials in Power House No. 1?

A. I was not only not under any requirements, but I would not have been permitted to do so by the officers in charge there.

Q. It was not a part of your contract to do that kind of work?

A. We were permitted to do only that work specified in [726] our contract, and inventorying the materials was not a part of our work.

(Testimony of William Edward Joslin.)

Q. At the time this contract was entered into did you have any basis for any knowledge, or did you have any knowledge, or did you expect the absence of materials to complete Power House No. 1, or did you have any knowledge of the presence of the materials at the site, in the Power House, or in storage? A. No.

Q. Let me put it this way: Did you have any knowledge which led you to believe that there was a shortage of materials?

A. I was positive there would be a shortage of materials, the fact that we were constantly borrowing from building to building throughout the area—any building that was in stand-by condition for about a year, there was an absolute certainty to be a shortage of material in that building.

Q. Do you know of any recognized method by which the amount of material necessary to complete Power House No. 1 could have been ascertained except by taking a physical inventory of what was then present in the building, and in adjacent buildings?

A. After Power House No. 1 was ordered into construction?

Q. Yes; after it was ordered into construction.

A. The only recognized method I would know would be this: You see work had been started in Power House No. 1 prior to the orders being issued to put it in stand-by condition, and the only way you could ascertain what was to be done, or what materials were to be supplied, would be to secure

(Testimony of William Edward Joslin.)

a set of plans and check that plan against the equipment and materials installed in Power House No. 1. Deduct that from the quantities as shown on the plans, that is, the material and the equipment as shown on the plans and make an inventory of the entire materials and equipment required and deduct that from the materials you secured in the plans, and the materials that had been installed.

Q. You say you take the entire amount of materials and equipment required and deduct that from the materials shown in the plans?

A. Yes. Perhaps my answer was not quite clear, but what I meant to say was that after you get a set of the plans you check that against the materials that are already installed in the power house. You deduct the materials installed from the materials and equipment shown on the plans, and also deduct the materials that are on hand from the materials shown on the plans. This would give you the materials missing.

Q. Was that what was in substance required under the contract with the plaintiff the Power Service Corporation? [728]

A. It was the plaintiff's responsibility to make the physical inventory—that was their responsibility.

Q. During the course of the contract, that is, the Power Service Corporation contract, requests for an addition, or a paragraph, modifying the terms of the contract by providing for a situation where damage could be claimed by the Power Serv-

(Testimony of William Edward Joslin.)
ice Corporation, and by the terms of the modification?

A. Yes; I think it was about August 8th.

Q. Yes, perhaps that is right. I am calling your attention now to Exhibit No. 9, and I will ask you if this matter of the addition of this clause was taken up with you at any time—I think Exhibit No. 9 is the first proposal for a change?

A. Yes; I remember receiving this.

Q. What exhibit are you talking about now, Mr. Joslin? A. This is Exhibit No. 9.

Q. That is right, Exhibit No. 9 dated August 8th, 1944, and is addressed to your company, and is as follows:

“Gentlemen:

“Referring to No. 1 boiler plant at Sunflower Ordnance Works on which we bid July 8th, 1944, we request permission to append the following proviso on the signature sheet of the formal contracts presented to us to sign.

““Water-wall and roof boiler tubes which were to have been furnished by the constructor and available [729] to the subconstructor immediately he was directed to proceed were not, and are not, as of date of contract so available. This contract is above executed by the subconstructor reserving full rights of recourse to claims for extension of time and for reimbursement of such increased costs as may be occasioned by non-availability of these above mentioned materials which were represented in bidding

(Testimony of William Edward Joslin.)

information to be at the site as of date of direction to proceed.' "

It is shown in the evidence that your agents refused that clause?

A. In the way it is worded, yes, sir.

Q. This proposed to insert the clause which says that this contract is executed by the subcontractor reserving full rights of recourse to claims for extension of time and for reimbursement of such increased costs as may be occasioned by non-availability of these above mentioned materials which were represented in bidding information to be at the site as of date of direction to proceed. Now, Mr. Joslin, was there any information authorized by you to any person in making a bid, or at any other time which in any way varied the terms of the proposals themselves? A. There was not.

Q. Under the contract the contractor was required to maintain as close as possible a proposed production or progress [730] schedule and the time for completion in the original contract was November 10th, 1944?

A. In the original contract, yes.

Q. And it also provided that an extension of time in proportion to the amount of any increased work, or increase to that contract, would be allowed to the subcontractor for completion?

A. Yes, sir.

Q. Did the Power Service Corporation ever ask for extra time on that?

A. I believe they did, and I might state in reply,

(Testimony of William Edward Joslin.)

that is, in my letters in the previous correspondence in which I objected to certain matters as written I did not object to the extension of time phrase. I think they did ask for an extension of time at a later date.

Q. That was your reply to letter which is Exhibit 9—you objected to that clause?

A. Yes, sir.

Q. But the matter of extension of time was covered by the contract?

A. Yes, sir; and they asked for an extension of time. I believe they did that later.

Q. And then later on they refused to accept the extension of time when it was granted?

A. That is right. [731]

Q. Under that computation of time under the contract, do you know the over-all addition that was given to the Power Service Corporation?

A. Yes, sir; approximately \$18,000.00, I believe.

Q. And would that extend the contract?

A. That automatically extends the contract for five days. That is my interpretation of it.

The Court: I believe we will recess for fifteen minutes at this time.

March 27th, 1947, 3:15 p.m.

Q. (Mr. Gibson, continuing): And that extension is something that you couldn't take away from the plaintiff if you wanted to?

A. No, sir; it was their automatic right.

Q. So that the real time for the completion of the contract, according to the plans and specifications would have been November 15th?

(Testimony of William Edward Joslin.)

A. That is my interpretation.

Q. And in addition to the \$466,000.00 that was paid the plaintiff was there additional work to complete the power house?

A. Yes, sir; we were allowed approximately \$40,000.00 for work which we were to do in completing the contract, work not [732] included in the Power Service Corporation contract, but yet a part of the completion of Power House No. 1.

Q. That \$40,000.00 was on the actual cost?

A. That was added to our existing contract as a modification.

Q. And that covered all the cost of that work?

A. Yes, sir, on which we secured our regular fee in the neighborhood of 1.7 per cent.

Q. And the total cost of the completed power house No. 1 was a few dollars over \$500,000.00, which you said it would cost?

A. I made an estimate that they would not receive a bid less than one half million. That was my estimate of the cost,—was \$400,000.00, but I said they would not receive a bid of less.

Q. Your estimate was that they would not get a bid of less than \$500,000.00?

A. Yes, sir.

Q. And that was for the completed job?

A. Yes, sir.

Q. You have read the clause added to the signature page of the contract and initialed by your man after your letter to him. Now, what interpretation do you place on that with reference to the main contract? [733]

(Testimony of William Edward Joslin.)

A. My interpretation is that it did not change the contract in any manner whatever.

Q. Upon what do you base that?

A. I base that on the fact that I gave instructions to Mr. Hagan on or about August 14th, 1944.

Q. That was,—strike that, please. During that period there was a discussion as to some proposal by the Power Service Corporation and the clause in their letter of August 8th?

A. That is right.

Q. You say you gave Mr. Hagan instructions?

A. Mr. Hagan was presiding at a conference in his office, and I attended, or invaded, that conference, and I informed him that I would not be a party to any clause that would change the terms of that contract in any way, shape or form, and I so instructed my Project Manager, Mr. Wedlick. That was about August 13th, 1944, and when this was signed I was positive that it did not change the language of the contract one bit, and during my visit to the Sunflower Works I confirmed this with Mr. Dergance, myself.

Q. What is your own interpretation of that clause? I believe you based your last answer in part as to information or confirmation of your opinion by Mr. Dergance. Now, I will ask you, Mr. Joslin, what is your own interpretation of the clause? [734]

A. My own interpretation is that the clause does not change the contract in any shape or form.

Q. And have you explained as to how you arrived at that interpretation,—what you base it on?

(Testimony of William Edward Joslin.)

A. I base it on this fact: That at no time did we ever attempt to deprive the Power Service Corporation of the rights under their contract, and to me this only reiterates the rights that existed at the time the contract was first submitted to them, and I further base it on the fact that if consideration is given to this clause then there is no completion date on the job, because if no consideration is given to paragraph 1-05 of the contract, it eliminates the completion date, and if consideration is given to paragraph 1-05 then the completion date is November 15th. The contract remains as is. But if consideration is given to this clause as added there is no completion date, and I don't think the Government would accept such a contract.

Q. Why do you say there is no completion date?

A. Well, there isn't a date for anything.

Q. Why do you say that?

A. If you eliminate paragraph 1-05 you eliminate the number of days in which this contract was to be completed, or, rather, when the project was to be completed.

Q. That is the only clause that provided a completion date? [734]

A. That paragraph contains the only clause as to any number of days in which the project must be completed.

Q. Then how do you arrive at the interpretation which you say you have arrived at?

A. Well, in this way: If consideration is given to this clause, of course, consideration can only be given to the fact that it eliminates paragraph 1-05,

(Testimony of William Edward Joslin.)

and if it eliminates 1-05 there is no completion date, and you have no delivery date of materials, and I know the Government would not approve that, and neither would I, and the fact the Government approved that is the basis for my interpretation.

Q. There must be a completion date?

A. Yes, sir; there must be.

Q. And paragraph 1-05 is the only clause, or contains the only clause that provides for a completion date?

A. It is the only paragraph that provides the time in which it must be completed.

Q. And the clause which mentions the delay in the delivery of materials, that would be based on the clause that this clause which is added to the contract is objecting to?

A. That is my interpretation.

Q. Some time before this contract was approved did you have occasion to meet Mr. Fegles, the President of the Power Service Corporation?

A. I did. [735]

Q. Did you meet him at the Gopher Ordnance Works?

A. At the Twin City Ordnance Works. I was called over by Colonel Taylor to bid on the completion of the Gopher Ordnance Plant. He was at that time the Area Engineer at Gopher and Twin Cities Ordnance Plants, and before going to the Gopher Plant, Colonel Taylor took me and introduced me to Mr. Fegles. I think it was at lunch. Colonel Taylor said, "I want you to meet your contractor,

(Testimony of William Edward Joslin.)

the one who has the subcontract at Sunflower," and Mr. Fegles said, "I would like to amend the contract there," and I said, "I am sorry, but that is not within my authority. So far as I am concerned, the contract will have to be left as written." That took place at the Twin City Ordnance Plant.

Q. That was before this clause was added?

A. Yes, before the clause was added to the contract.

Q. Mr. Joslin, have you prepared a diagram, or a schedule, to explain as you view it the construction, or the progress schedule, that has been submitted in this matter by the plaintiff?

A. Yes, sir; I have an enlargement of their progress schedule.

Q. From the schedule as it is enlarged by your copy, can you show the time at which certain items should have been completed, after the receipt of materials that have been [736] claimed here were short?

A. After they were delivered, you mean?

Q. Yes; after they were delivered.

A. Yes, sir; I can.

Q. First, would you explain what lower document is?

A. That is the progress schedule which has been submitted by the plaintiff.

The Court: The record may show they are now talking about Exhibit No. 62.

Mr. Watts: That is correct.

Mr. Gibson: Yes, this is Exhibit 62.

(Testimony of William Edward Joslin.)

Q. I hand you Exhibit 62, and I will ask you if you will compare that with the copy of the one from which you made your enlargement.

A. Yes, sir; and I will say that is a duplicate copy.

Q. Then from Exhibit No. 62 have you made an enlargement on some of the segments of this work?

A. Yes.

Q. Will you explain what the enlarged chart is?

The Court: You may mark this as Defendant's Exhibit "P". I believe that is the next letter.

Mr. Gibson: Pardon me, your Honor. I should have had that marked.

(Whereupon document referred to was marked Defendant's Exhibit "P", for purposes of identification.) [737]

Q. (Mr. Gibson, continuing): Now, go ahead, Mr. Joslin.

A. This one happens to be a break-down of the drums, tubes, water-all headers and tubes.

Q. And your Exhibit P is a break-down of this schedule?

A. This is a break-down of the Power Service Corporation's schedule dealing with the drums, tubes, water-wall headers and tubes between these dates, July 19th and August 23rd. This indicates July 19th, right here (indicating), and this indicates August 23rd right here (indicating); in other words, that represents thirty-six days to accomplish the setting of the drums, tubes and water-wall headers.

(Testimony of William Edward Joslin.)

Q. For what particular boiler is that?

A. Boiler No. 1. There is thirty-six days to complete this, which makes 2.78 per cent of completion per calendar day. That is the proposed schedule. They started on this date indicated by the black line. The black represents the actual operation. This broken line represents their proposed schedule, and the black line their starting date, and this is the actual operation through here (indicating). They started, as you can see, on July 19th.

Q. On what segment of the work was that?

A. On the boiler drum, tubes and headers. That is in here (indicating). They started on July 19th, the day they proposed to start, and on August 19th they issued their first [738] requisition.

Q. For what was that requisition?

A. For tubes. It is shown here on this enlargement (indicating). On August 3rd the Power Service Corporation advised that the tubes were required on August 1st. This was on August 3rd that they stated that the tubes would be required on August 1st. On August 26th was the first notice of any tube shortage, and the first requisition was issued to us on August 19th,—pardon me, I think I said August 26th was the first notice of tube shortage; I should have said July 26th, instead of August 26th. This boiler was started on July 19th and completed on September 8th. I might explain here that in accordance with our interpretation. Mr. Borst was asked for the completion date of the boiler tubes, drums and headers, and I think he said

(Testimony of William Edward Joslin.)

December 1st. We take it it was on September 8th that he reported the drums, tubes and headers as 99.9 per cent complete, and they ceased all operations from that time on. I don't know how late it was, but I think that this is to November 24th, and there was no further operation on that boiler after September 8th.

Q. Did Mr. Borst state yesterday that it was completed on December 1st?

A. Which would mean that they completed one-tenth of [739] one per cent, or an amount equal to \$32.80, and that required eighty-three days to complete \$32.00 worth of work, but we assumed this is the date they completed, the day they stopped all of the work.

Q. And what date was that, Mr. Joslin?

A. September 8th. Down here (indicating) in accordance with their schedule, they had the drums and tubes for Boiler No. 1,—they were available on the site for Boiler No. 1, and they should have completed this on August 31st, because on August 17th the water-wall tubes were delivered.

Q. Now, this is boiler No. 1?

A. Yes. On boiler No. 1 the tubes were delivered on August 17th, and on August 25th it shows on the schedule that they were 84.5 per cent complete, and just applying their own percentage rate of completion per week, it would then have been completed on August the 31st.

Q. Were the materials there?

A. Yes; they were all there in order that it

(Testimony of William Edward Joslin.)

could have been completed on August 31st, if they had maintained their schedule.

Q. And, actually, they completed on September 8th with boiler No. 1? A. Yes.

Q. Now, you may go ahead with your explanation, Mr. Joslin. [740]

A. On boiler No. 2 they proposed forty-two calendar days, that is, between the dates of July 20th and August 30th, forty-two days, or an average of 2.38 per cent completion per calendar day, but ninety days were required to complete this boiler. They started on July 25th.

Q. Their estimated time was how much?

A. Forty-two days.

Q. And they used how much?

A. Ninety days, an average of 1.11 per cent completion per calendar day. If the Power Service Corporation had maintained their own schedule as shown there, with the water-wall tubes delivered on August 20th, and I might say here, the Power Service Corporation notified us that there was an error in the water-wall header on September 27th, and the error in the tubes was corrected on October 18th, at which time their schedule,—this schedule here (indicating),—on October 18th their schedule shows them to be 97.8 per cent completed, if they had maintained their schedule; so on October 18th they would have required two days following their own schedule to have been one hundred per cent complete; in other words, they should have com-

(Testimony of William Edward Joslin.)

pleted on October 20th, when actually they did complete on October 27th.

Q. You said that the water-wall tubes were delivered on September 20th? [741]

A. No; they were delivered on August 20th. The Power Service Corporation notified of the error in the water-wall header on September 27th, and that error was corrected on October 18th, and they should have been ninety-seven and eight-tenths per cent completed, in accordance with their schedule, and it would have required only two days to finish. Actually, they completed October 27th, which was seven days behind on boiler No. 2. On boiler No. 3 they show forty-five calendar days to complete, between July 25th and September 6th, an average of 2.22 per cent completion for each calendar day. The actual record is that there was seventy-one days and an average of 1.41 per cent completion per calendar day. The water-wall tubes were delivered on September 20th. The headers were delivered September 26th, on which dates, or, rather, on the 26th their schedule shows 58 per cent completion, and following their schedule of an average of 2.22 per cent completion per calendar day, they should have been,—

Q. (Interposing): That was their estimate?

A. Their proposed construction schedule. They proposed to accomplish that from July 25th to September 6th, and on September 26th, which was the date the water-wall tubes and headers had been delivered,—following their own construction schedule

(Testimony of William Edward Joslin.)

they would have been completed on October 14th. They actually completed October 20th, which was also six days late. [742] Mr. Borst stated that he completed the boiler construction, that is the drums, headers and tubes on December 19th, not on October 20th, but on October 20th they ceased all operation on boiler No. 3 when they were 99.7 per cent complete, and it is hardly conceivable that they could only accomplish three-tenths of one per cent of this work from October 20th until December 19th. We maintain, and I think this will prove, that had they maintained their schedule boiler No. 1 would have been completed on October 31st; boiler No. 2,—that is, the drums, tubes and headers, would have been all completed on October 20th; boiler No. 3 would have been all completed on October 14th.

Mr. Gibson: I wonder if the record shows this is admitted?

The Court: Yes; the record shows that your Exhibit P is admitted.

(Whereupon Defendant's Exhibit P, so marked for identification, was admitted in evidence.)

Mr. Gibson: Very well. Now, I will proceed with this.

Q. (Mr. Gibson, continuing): Now, let's identify this document. What does that purport to be?

A. Well, this is Item No. 2 on boiler No. 1 of segment No. 3; that is Item No. 3, the pulverizers, exhaust, burners, and soot blowers. They are listed, as I said, or attempted to [743] say, as Item No. 2 of Segment No. 3 on boiler No. 1, that is, it refers to boiler No. 1.

(Testimony of William Edward Joslin.)

The Court: You are now indicating, Mr. Joslin, to Plaintiff's Exhibit No. 62?

A. Yes, to Item No. 3.

Q. (Mr. Gibson, continuing): And this refers to Item No. 3 on segment No. 4 under boiler No. 2?

A. Yes, sir; and this (indicating) is Item No. 4, segment 5 of boiler 3.

Mr. Gibson: This is now referring to Exhibit 62, and I will offer as our exhibit this document, which will be Exhibit Q.

(Whereupon document referred to was marked Defendant's Exhibit "Q" for purposes of identification.)

Mr. Watts: We have no objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "Q," for identification, was admitted in evidence.)

A. Now, on this we are not taking the dates as to the installation or completion of the work regarding the tubes and headers. There is a certain sequence of operation. You have the erection of the steel, and you have the drums. You of course cannot set the drums unless the steel is in place, and **you can't put the tubes in unless the drums are in place, [744]** and you have the furnace and the boiler tubes and the water-wall tubes, and after that you have the hydrostatic tests, that is, plugging up of the openings and filling with water, and testing for leaks. In this project the only claim we have here is an alleged shortage of boiler tubes and headers. We are basing everything upon the com-

(Testimony of William Edward Joslin.)

pletion of the boilers, the tubes and the headers from that date, and we are taking the dates that they actually completed their work on the boiler tubes and headers on boiler No. 1, which was September 8th. After that completion they showed that they would require eighteen days to complete the pulverizers, exhaust, burners, and soot blowers,—that is on boiler No. 1.

Q. And that is their schedule?

A. Yes. Which would make their completion date September 26th on boiler No. 1.

Q. How do you arrive at the eighteen days?

A. Well, they show the completion of the drums, tubes and headers here (indicating), and they show that they require eighteen days after the drums, headers and tubes are completed. They show on their own schedule here (indicating) that they will require eighteen days to complete it, which will bring that date to September 26th, on which they would have had this work completed, had they maintained their schedule, but they were actually completed on October 27th. On boiler No. 2 they [745] required eleven days to complete this work after the,—

Q. (Interposing): Just a moment, Mr. Joslin. How do you arrive at that time, the eleven day period?

A. According to their own schedule, they require eleven days to complete.

Q. And that is shown by their exhibit?

A. Yes, sir. This proposed schedule shows that

(Testimony of William Edward Joslin.)

they proposed to complete this work in eleven days, so that would leave eleven days from October 27th, and according to that they would have completed the pulverizers, exhaust, burners and soot blowers on November 7th. On boiler No. 3 the schedule calls for eleven days for the completion of the pulverizers, exhausts, burners and blowers after the drums, tubes and headers were in place, and they were in place on October 20th, and following their own schedule that would have been completed on October 31st.

Q. With reference to these items, there was a question of absence of materials, was there?

A. No question of absence of materials on this.

Q. The only thing was that certain work had to be done before they could complete this?

A. Nothing should have held this work up, except the lack of manpower. We are assuming, of course, that the plaintiff contends that because the boilers, drums, tubes [746] and headers were not completed that they were delayed, so we are taking the completion date of the boilers, drums, tubes, and headers, and going from that point to show that it could be completed on the dates that I have shown here, assuming that they did interfere with this work. Now, I will go to the next item.

Q. That document purports to be what?

A. That has to do with the induced and forced draft fans and drives.

Q. That has been marked Exhibit R?

A. Yes, sir.

(Testimony of William Edward Joslin.)

(Whereupon document referred to was marked Defendant's Exhibit R, for purposes of identification.)

Mr. Gibson: We offer now Exhibit R,—Defendant's Exhibit R.

Mr. Watts: No objection.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit R, so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing): You said that has to do with induced and forced draft fans? And drives? A. Yes.

Mr. Gibson: This is Item No. 7 of segment 3 on boiler No. 1. [747]

Q. (Mr. Gibson, continuing): Was that statement correct that I just made, Mr. Joslin?

A. Yes; it was.

Q. Speaking from plaintiff's Exhibit No. 62, as I mentioned, it is Item No. 7 of segment No. 3 in regard to boiler No. 1, and it is Item No. 9 of segment No. 4 under boiler No. 2, and it is Item No. 10 under segment No. 5 of boiler No. 3, induced and forced draft fans and drives? A. Yes, sir.

Q. And Exhibit R is an enlargement from Exhibit No. 62 as to the items that I have mentioned in regard to the work on those items?

A. Yes, sir; on that part of the work the Power Service Corporation proposed to complete this job in seventeen days after August 31st, or on Septem-

(Testimony of William Edward Joslin.)

ber 17th, a total of seventeen days, an average completion of 5.88 per cent per calendar day. That is from their own statement, and the boiler was completed on September 8th.

Q. That is, it was 99.7 per cent complete?

A. Yes; and maintaining their schedule they would have been completed on September 10th.

Q. You say, Mr. Joslin, maintaining their own schedule, you mean, maintaining their own schedule they would have completed what? [748]

A. The induced and forced draft fans on boiler No. 1 on September 10th.

Q. How do you arrive at that date?

A. Their schedule shows that continuing on from the date the drums, tubes and water-wall headers were completed that with this work we are considering now they were ninety per cent complete on September 8th. You can follow this line (indicating) and as you come to the item of induced draft fans on September 8th here (indicating), you follow this line up and there is the percentage of installation on September 8th, that was installed at that time, if they completed their schedule.

Q. The number following up this line of September 8th is the percentage of work installed?

A. Yes, sir. These are the calendar days (indicating). On September 8th, which is here (indicating),—this should be October 8th. I have been saying right along "September 8th." I wonder if it could be understood that should be October 8th?

(Testimony of William Edward Joslin.)

They were ninety per cent completed, and at the rate of 5.88 per cent completion per calendar day they would have completed that work in two days, which would have been on October 10th.

Q. When did they complete?

A. I don't know that I have that. That is the last date I have, October 10th.

Q. How much was completed at that time? [749]

A. Well, there was 98.8 per cent.

Q. Was there any shortage of material on that work? A. No shortage of material there.

Q. Now, go ahead with the next item.

A. Well, the same thing on boiler No. 2. They proposed the same number of days, seventeen calendar days, an average of 5.88 per centage completion per calendar day. Their schedule shows that they were ninety-four per cent complete on October 20th,—no; they were one hundred per cent complete on October 20th, as shown here, so there is no question about that one. Now, on boiler No. 3 they show an additional nineteen calendar days to complete, or five and twenty-six one-hundredths per cent completion per calendar day on the forced draft fans,—this is on boiler No. 3.

Q. Now, point that out on this chart that I am indicating.

A. Here on the large chart it is reflected, nineteen calendar days, and the average percentage of completion per calendar day of 5.26 per cent, as shown here. On October 20th, the day this boiler was completed, they were 57.4 per cent completed

(Testimony of William Edward Joslin.)

on this work, which at the same rate at which they proposed to perform, would have completed the job on October 28th, and they did complete on October 28th, on the day that they proposed to complete, so there was no delay here. Now then, this is the ash and soot hoppers. [750]

Mr. Gibson: This exhibit is marked and is now offered, if the Court please, as the Defendant's next exhibit, which would be Exhibit S.

(Whereupon document referred to was marked Defendant's Exhibit S, for purposes of identification.)

The Court: Is there any objection?

Mr. Watts: We have no objection.

The Court: Then it may be admitted. And that is what?

Mr. Gibson: Exhibit,—Defendant's Exhibit S, your Honor.

(Whereupon Defendant's Exhibit S. for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing): And that is what, Mr. Joslin?

A. That shows the ash and soot hoppers.

Q. And it is an enlargement of the segment of Exhibit No. 62 offered and admitted as Plaintiff's exhibit, that portion of the work designated as ash and soot hoppers?

A. Yes, sir; item No. 5 of segment 3, boiler No. 1; also item No. 6, segment 4, boiler No. 2; and item 8, segment 5, boiler No. 3. That is all reflected on this chart.

(Testimony of William Edward Joslin.)

Q. You have been talking about Plaintiff's Exhibit No. 62? [751]

A. Yes, sir; their proposed schedule.

Q. All right, Mr. Joslin. What did it call for?

A. From July 19th to September 8th, and it shows that between September 14th,—let me correct that last statement: It was from September 14th to September 30th.

Q. And that shows what?

A. Their proposed schedule shows a total of seventeen days to complete the ash and soot hoppers.

Q. Will you point that out on the lower exhibit?

A. Yes, here it is on there (indicating),—their proposed schedule right here (indicating). Now here is the item we are discussing, the ash and soot hoppers, their proposed schedule, and it is reflected up here on this enlarged chart. It shows seventeen days operation to complete the ash and soot hoppers, at an average of 5.88 per cent completion per calendar day on boiler No. 1. They completed the work on boiler No. 1 September 8th and started on this ash and soot hoppers on September 14th; maintaining their own schedule they would have been one hundred per cent complete on September 30th. They proposed to do it in that length of time. There was no shortage of material, and they actually started so that they should have completed on September 30th, but they did complete on October 20th. That was on boiler No. 1, and on boiler No. 2 this is the date (indicating) that it should have been

(Testimony of William Edward Joslin.)
completed, [752] but this is the date (indicating) that it was actually completed. They proposed to complete this work on September 18th,—no; that is wrong; it was on October 8th, but they started here prior to the proposed date. They started back here (indicating). They proposed to complete this work between September 15th and October 8th, a total of twenty-four calendar days, with an average of 4.16 per cent completion per calendar day on this boiler No. 2, and that work should have been completed, with the work on this boiler, on October 20th, but they actually completed on October 27th, on which date they were 87.7 per cent complete, which is reflected on this exhibit (indicating). Now, that is according to their own schedule. They were to complete the work on the ash and soot hoppers on November 2, but they actually completed,—or, rather, they were still incomplete on November 10th. In fact, very few of these items have been entirely completed. On boiler No. 3,—I will go to that now,—they proposed to complete this work on boiler No. 3 between September 21st and October 13th, an average of 4.34 per cent completion per calendar day. The boiler was completed on October 20th, and they should have been completed with this work on October 31st, because on October 20th they were fifty-five per cent complete with the ash and soot hoppers on boiler No. 3 as reflected in their progress schedule, allowing the schedule of 4.34 per cent completion per calendar day, they would have been one hundred [753] per cent complete on October 31st.

(Testimony of William Edward Joslin.)

Q. What did happen?

A. Well, what did happen was that on November 10th on boiler No. 3 they were still incomplete. They were 96.7 per cent complete on boiler No. 3; and on boiler No. 2 they were 99.2 per cent complete on that boiler on November 10th, and on boiler No. 1 they were complete.

Q. That is not giving any consideration to the extra days they were entitled to by virtue of the increase in the contract? A. No.

Q. Now, what is the chart you have put on the board, Mr. Joslin?

A. That is the enlargement of the brickwork which is represented on the Power Service Corporation schedule, which has been marked and admitted as Exhibit No. 62.

Q. And this exhibit which you have put on the board now is marked as Defendant's Exhibit "T"?

A. Yes, sir.

(Whereupon document referred to was marked Defendant's Ex. T for purposes of identification.)

Mr. Gibson: We will offer that in evidence, if the Court please.

Mr. Watts: We have no objection. [754]

The Court: It may be admitted.

(Whereupon Defendant's Ex. T so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Now you said this covered what? A. The brick work.

Q. And that is set forth in Exhibit No. 62?

A. Yes, sir.

(Testimony of William Edward Joslin.)

Q. Can you indicate that for the record, Mr. Joslin?

A. Yes. It is set forth as Item No. 3 on segment 3, boiler No. 1; as Item No. 4, segment 4, boiler No. 2; as Item No. 5, segment No. 5, boiler No. 3. The Power Service Corporation's schedule shows thirty days to complete the brickwork on boiler No. 1, between the dates of August 26th and September 24th, thirty calendar days, or an average completion of 3.33 per cent completion per calendar day. That is on boiler No. 1, and the brickwork was completed prior to November 10th, so there is no question about that. On boiler No. 2 the Power Service Corporation's schedule shows thirty days to complete this brickwork, between September 1st and [755] September 30th, an average completion of 3.33 per cent per calendar day, between September 1st and September 30th. The Power Service Corporation started the work on August 31st, on boiler No. 2, and on the date the boiler was completed—not when it should have been—but when it was completed they were thirty-eight per cent complete with the brickwork. Maintaining their own schedule and working two shifts they would have been one hundred per cent complete on November 6th, the date that they completed the boiler. On boiler No. 3 the Power Service Corporation's chart, or schedule, shows thirty days to complete the brickwork. That would be thirty calendar days, and an average completion of 3.33 per cent per calendar day.

(Testimony of William Edward Joslin.)

Q. During what period of time?

A. Between September 6th and October 5th. Boiler No. 3 was completed on October 20th at which time the Power Service Corporation was eighteen per cent completed with this work.

Q. As to what item was that?

A. The brickwork, and maintaining their own schedule with two shifts they would have been completed on October 31st. On this same chart we have included—

Q. (Interposing:) What date did they actually complete on boiler No. 2 and boiler No. 3—if I could have the last schedule showing the completion date? [756]

A. I don't think it is extended to the completion.

Q. They carry it to what time?

A. November 10th.

Q. Does that show what per cent was complete of the brickwork on boilers Nos. 2 and 3?

A. Yes, sir; on boilers Nos. 2 and 3 on November 10th, let's see—on boiler No. 2 the brickwork was sixty-seven per cent complete, and on boiler No. 3 the brickwork was fifty per cent complete as shown on their schedule which shows the percentage of work on each reported week.

Q. Have you any previous reports which show these figures, that is, which show a different amount of completed work from this exhibit?

A. If I can have exhibit of August 25th, September 1st, and September 8th, I think that will

(Testimony of William Edward Joslin.)

show the progress and the percentage of completion during those times.

Q. One certain percentage of completion is shown, that is when a certain segment has been completed to a definite fixed degree that percentage is set forth on the chart as of the particular date and then we will say there is no more work done on that until some subsequent date. All of the charts carry that same figure until the work is again taken up or until it is completed?

A. No; that is not as I understand it. [757]

Q. Will you explain it?

A. Yes. This chart (indicating) shows percentage of completion as of that date at 33.3 per cent.

Q. And what particular work is that?

A. That is on the drums, tubes, and headers here (indicating). And the next report is seven days later and that shows 53.9 per cent complete, and down here it shows 58 per cent. The next week it shows 63.8 per cent; the next is 86.3 per cent; the next week is 95.9; the next week shows 99.7 per cent complete; the next is 99.7; and also the next.

Q. That is assuming that the work has been completed?

A. Well, the work would have had to have been all done to show any increase.

Q. If no further work was done that percentage would remain the same?

A. On October 20th with the drums, tubes and headers, 99.7 per cent complete, to all intents and purposes that job was entirely completed, because the work all ceased.

(Testimony of William Edward Joslin.)

Q. On the subsequent reports, it shows what?

A. The same percentages, because all work ceased.

Q. Now, Mr. Joslin, just proceed with the next item.

A. Well, it is on this same chart. We carry the ash hopper lining, which is a part of the brickwork, and they are shown on boiler No. 1 as Item No. 6, under segment No. 3. [758] That is Exhibit No. 62, which would be the plaintiff's exhibit. It is Item No. 7 on boiler No. 2, and Item No. 8 on boiler No. 3. On boiler No. 2 it is shown as segment No. 4 and boiler No. 3 is shown as segment No. 5, and, as I said, they are all shown on Plaintiff's Exhibit No. 62, which is a Power Service Corporation's schedule, and it shows that seven calendar days were needed to complete the ash hopper lining, an average of 14.28 per cent completion per calendar day. Now, that was on boiler No. 1. That work was completed on October 20th, and the boiler was also completed. On boiler No. 2 the schedule shows between October 6th and the 13th, which was seven days, that it required to complete this ash hopper lining, an average of 14.28 percentage of completion per calendar day. Boiler No. 2 was completed on October 27th.

Q. You mean as to what phase of the work?

A. The drums, tubes and water-wall headers. There was nothing to stop the operation from then on, and the Power Service Corporation was twenty-five per cent complete at that time.

(Testimony of William Edward Joslin.)

Q. As to what item were they twenty-five per cent completed?

A. The ash hopper on the date of completion of the boiler, and maintaining their own schedule they should complete the work on October 30th.

Q. Have you a record to show when it was completed? [759]

A. On November 10th the ash hopper lining was 96.7 per cent complete—no; that was on boiler No. 3, but on boiler No. 2 the ash hopper lining on November 10th was 80 per cent complete. It was 25 per cent complete on the date the boilers were finished, and two weeks later they were 80 per cent complete. In ten days they accomplished less than fifty per cent completion. On boiler No. 3 the schedule shows the ash hopper lining to be completed between October 13th and October 20th, an average of 12.5 per cent completion per calendar day. There were eight days allowed for this work. On October 20th the Power Service Corporation completed boiler No. 3 on the drums, tubes and headers, and at that time they were five per cent completed on the ash hopper lining, and by working two shifts—

Q. Where is that reflected, Mr. Joslin?

A. That would be reflected right here (indicating).

Q. Now, go ahead with your explanation?

A. By working two shifts they would have completed on October 24th, according to their own schedule. We carry this at two shifts, which in my opinion, was not necessary. They could do it on one shift.

(Testimony of William Edward Joslin.)

Q. Would it have been possible to work a shift on the brickwork, and a shift on the ash hopper at the same time?

A. Yes; it would have been possible. They could have completed this work on the same date as boiler No. 1 was [760] completed.

Q. Now, does that cover all of the items shown on Exhibit "T"?

A. Yes; that covers exhibit "T", and the next we have, is this exhibit which is marked "U".

(Whereupon document referred to was marked Defendant's Exhibit "U" for purposes of identification.)

Mr. Gibson: I now have proposed Defendant's Exhibit "U", and after identification I will offer that.

Mr. Watts: We have no objection to this going in.

The Court: Then, if there is no objection, the exhibit may be admitted.

(Whereupon Defendant's Exhibit U, was so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson): Will you identify it, Mr. Joslin?

A. This is an enlargement of the Power Service Corporation's schedule on boiler exterior casing on boilers No. 1, No. 2, and No. 3. It is designated as Item No. 4, segment No. 3, boiler No. 1; Item No. 5, segment No. 4, boiler No. 2; Item No. 6, segment No. 5, boiler No. 3.

(Testimony of William Edward Joslin.)

Q. On what exhibit?

A. On the Plaintiff's Exhibit No. 62.

Q. On one exhibit—Plaintiff's 62, it says boiler exterior casings, and on this, which is your enlargement, it says "boiler [761] casings." Boiler exterior casings and boiler casings are the same, are they?

A. Yes, sir; they are the same.

Q. Then the subject matter covered on both of the exhibits, or both charts, is the same?

A. Yes, sir. On boiler No. 1 the drums, tubes and water-wall headers were completed on September 8th. This work was also completed on time, so there is no question on that. On boiler No. 2 the drums, tubes and headers were completed on October 27th, and if they had maintained and followed their own schedule they would have been completed on the 20th.

Q. As to what item?

A. As to the drums, tubes and headers. The Power Service Corporation's schedule shows the completion of the casings between September 27th and October 14th. Their proposed schedule of eighteen calendar days, or an average of five and fifty-five one-hundredths per cent completion per calendar day on boiler No. 2.

Q. Now, will you point that out on the exhibit 62, Plaintiff's Exhibit 62?

A. This exterior casing, that is Item No. 6 under boiler No. 3, right here (indicating). They proposed to complete between this date and this date (indicating) in their own chart. [762]

(Testimony of William Edward Joslin.)

Q. What dates are those?

A. September 27th, represented by this date, or line, and October 14th, which is represented by this line (indicating).

Q. You are referring to Exhibit No. 62?

A. Yes, sir; to Item No. 5, segment No. 4, under boiler No. 2. Now, I go to boiler No. 3. They proposed to complete between the dates of October 3rd and October 20th. They allow eighteen calendar days to complete, or an average of 5.55 per cent completion per calendar day, on boiler No. 3. This is represented on their schedule as Item No. 6, under segment No. 5, boiler No. 3, which shows the dates between October 3rd and October 20th. On the date that No. 3 boiler was completed the Power Service Corporation shows the casing as fifteen per cent completed, and had they followed their own schedule they would have been one hundred per cent complete on the boiler exterior casing on November 5th for boiler No. 3, and I don't know whether I said, or not, that on boiler No. 2 on the date that the boiler was completed the tubes, drums and headers were completed. The Power Service Corporation's schedule shows twenty-five per cent of the exterior casing as completed on that date.

Q. That is as to what item again, Mr. Joslin?

A. On the boiler exterior casing, and following their own schedule on that they would have been completed on November [763] 10th, one hundred per cent complete.

Q. Was that involved in overtime?

(Testimony of William Edward Joslin.)

A. No, sir; that is with regular shifts.

Q. At that time there was no shortage by reason of any delay in delivery or any other reason?

A. There was no shortage of material on these items at all.

Q. Was there any conflict between working on the casings and other items of construction going on at any time?

A. The brickwork and boiler casings could have been carried on together as they were in boiler No. 1, as it is reflected by the Power Service Corporation's schedule, which shows the brickwork on October 20th was one hundred per cent, or ninety-eight per cent completed, and they ceased operations, and the ash hopper lining was completed on the same date. These items could have been carried on simultaneously and completed on the same date as they did on boiler No. 1. These charts cover all the items under segment No. 3 on boiler No. 1; segment No. 4 on boiler No. 2; segment No. 5 on boiler No. 3. They were completely shown there with the exception of boiling out of the boiler, and no chart was made of that for the reason that that part of the work was deleted from the Power Service Corporation's contract and later reinstated at a price submitted by the Power Service Corporation, which was approved by the contracting [764] office, and for which they were paid, and that reinstatement was beyond November 10th, I believe.

Q. Calling your attention to the document which is marked as Defendant's Exhibit "V", will you describe that?

[(Testimony of William Edward Joslin.)

(Whereupon document referred to was marked Defendant's Exhibit "V" for purposes of identification.)

A. This document covers items under segment No. 1, which are designated as "piping," and it covers items one, two, three, four, five, six and seven, the items of exhibit No. 62 under segment one, "piping systems." The miscellaneous piping was omitted from this chart because miscellaneous piping covers odds and ends, or miscellaneous items which could be, and was, done, at the time the Power Service Corporation was off the other work.

Q. Was the material for miscellaneous items available there?

A. All of the items for the miscellaneous piping were at the site and available at any time.

Q. And would that come under miscellaneous items of odds and ends?

A. Yes, sir, and we have omitted that item from our chart.

Mr. Gibson: At this time I will offer, for illustrative purposes only, Defendant's Exhibit V.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit V, so marked for identification, was admitted in evidence.)

A. This is item No. 1 under segment 1 of Exhibit No. 62, the Power Service Corporation's construction schedule, and on their schedule dates it is between July 17th and October 11th.

Q. That represents what?

(Testimony of William Edward Joslin.)

A. The time to install the main and auxiliary piping, high power steam pressure.

Q. Is that their proposed schedule?

A. Yes, sir; that is the days proposed to be required for the completion, the time in which they would have completed the auxiliary and main high pressure steam piping. They started on August 8th and maintaining their schedule—this exhibit shows that on October 27th, the date on which the last boiler was completed as to tubes, drums and headers, on this work they were 98.4 per cent complete, and the day the last boiler was set as to tubes, drums and headers.

Q. On what segment is that?

A. That is on the high pressure steam piping, and maintaining their own schedule they would have been completed easily in two days, at an average of 1.09 per cent per day.

Q. In two days from what time do you refer to now? [766]

A. From October 27th, the date on which the last drums, tubes and water-wall headers were erected and in place.

Q. Is that on all three of the boilers, Mr. Joslin?

A. Yes, sir; on all three of the boilers.

Q. Does it show when they did complete the work so far as their exhibit—exhibit No. 62, is concerned?

A. My exhibit shows that on November 10th they were 94—no; that is 99 per cent complete, on November 10th.

(Testimony of William Edward Joslin.)

Q. Then you may go ahead now with the next item, if you have finished.

A. The next item is Item No. 2 designated as "boiler feed discharge and suction," and that is in segment No. 1—I don't recall whether I said on this first item of the main and auxiliary high pressure steam piping they showed that they intended, or their schedule called for eighty-seven calendar days at an average of 1.15 per cent completion per calendar day on that piping, and they were not finished until—well, it shows they were 98.4 per cent complete On October 27th, and could have been completed in two days, easily, had they followed their own schedule, and then, as I told you, they were not quite complete, but for all intents and purposes it was completed on November 10th. Now, on this item which is designated "boiler feed discharge and suction," their schedule was for ninety-one calendar days between July 20th and October [767] 18th, for an average of 1.19 per cent completion per calendar day.

Q. And that is according to what?

A. That is according to their own schedule, and on the date of the completion of the boilers as to drums, tubes and headers, they were completed on this item, so there is no question about that. They show 99.2 per cent, so that is practically completed.

Q. As of what date?

A. On November 10th, but on the last date of the boiler erection—that is, on the date that the boilers were erected, which was on October 27th,

(Testimony of William Edward Joslin.)

they were 98.7 per cent completed, so we granted them as being one hundred per cent complete. They were practically completed at any time within two or three days of the time the boilers were completed as to the tubes, drums and headers.

Q. Now then, go ahead with the next item, if you have finished with Item No. 2.

A. The next item, No. 3, is designated as "low pressure steam and exhaust," under the piping systems on segment No. 1 of Exhibit No. 62. Their proposal was to do this work between July 31st and October 17th. However, they started on August 5th. Their proposal shows an average of 1.27 per cent completion per calendar day, with seventy-nine calendar days [768] to complete the work. On the date the last boiler tubes, water-wall headers and drums were in place—

Q. Which was on what date, Mr. Joslin?

A. On October 27th. At that time they were 95 per cent completed with this work as reflected on their exhibit No. 62.

Q. Can you point that out on their exhibit?

A. Yes; Item No. 3 on October 27th was 95 per cent completed as reflected in their exhibit, and maintaining their own schedule they would have completed in six days from October 27th.

Q. With one or two shifts?

A. With one shift.

Q. When did they complete, or what percentage was completed by November 10th?

A. On November 10th they were 98 per cent

(Testimony of William Edward Joslin.)

completed—I wonder if I gave the correct figures on Item No. 2? No. 2 shows here that they were one hundred per cent complete on November 10th, so there was no question about that. In fact, they were one hundred per cent complete on the date the tubes and headers and drums were in place. On Item No. 3 they were 98 per cent complete. Now, shall I go ahead with Item No. 4?

Q. Yes; just proceed. [769]

A. Item No. 4 is designated in Plaintiff's Exhibit No. 62 as "treated, softened and filtered water—cooling water"—it is under the piping system, and segment No. 1 of Exhibit 62, and it is Item No. 4. The Power Service Corporation's schedule shows that they proposed to do this work between July 31st and October 30th. The proposed completion date was October 30th, or ninety-two calendar days for an average of 1.08 per cent completion per calendar day. They started early; they started on July 26th, and on the date the last drums, tubes and headers were in place, on October 27th, they were 94.5 per cent completed on this work. Had they maintained their own schedule they would have completed in six days from October 27th.

Q. Does the record show what percentage was completed on November 10th?

A. On November 10th they were 96.7 per cent complete.

Q. And is that what you have reflected on the large chart?

A. Yes, sir. That is reflected on the large chart,

(Testimony of William Edward Joslin.)

and their actual percentage of completion is shown here on my large chart, as I say, and it is also shown on their proposed schedule—this (indicating) is the actual percentages.

Q. And they are taken from exhibit No. 62, are they? A. That is right. [770]

Q. Now, go ahead with the next item, if you have finished.

A. Item No. 5 is represented on Exhibit No. 62 as "boiler and W.W. blow-off, condensed blow-down."

Q. What does "W.W." mean?

A. Water-wall. That is also under the piping system, under segment No. 1 of Exhibit No. 62. It is Item No. 5. They proposed to start on September 20th and to complete on October 30th. They have allowed forty-one days for the completion, or an average of 2.44 per cent completion per calendar day. On October 27th, the date the last tubes, drums and headers were installed, the Power Service Corporation was 97.7 per cent completed on this work, and maintaining their own schedule they would have completed in two days, and on November 10th they were 98.3 per cent complete.

Q. And they accounted for how much of that work from October 27th until November 10th?

A. Six-tenths of one per cent, as I figure it.

Q. Have you finished now with that item?

A. Yes, except that they did start on that work earlier than September 20th, and took more than their supposed number of calendar days.

(Testimony of William Edward Joslin.)

Q. Now, if you have finished go ahead with the next item.

A. That is Item No. 6 on this exhibit. It is designated [771] as "drain, vent and trap piping." That is also under the piping system on Exhibit No. 62. They proposed to start this work on September 30th and complete on October 30th, allowing thirty-one calendar days for an average of 3.22 per cent completion per calendar day. On October 27th, the date the last drums, tubes and headers were completed on these boilers, the Power Service Corporation's schedule shows that they were 78 per cent complete with this work.

Q. Can you point that out on Exhibit No. 62, Mr. Joslin?

A. Yes; this is the percentage here (indicating).

Q. Designated as seventy-eight per cent?

A. Yes.

Q. It is in the fine type?

A. Yes, sir; that is right, and maintaining their own schedule they would have been completed with this work in seven days.

Q. With one or two shifts?

A. With one shift, and on November 10th they were 92 per cent complete.

Q. So that between the 27th of October and November 10th they moved from seventy-eight per cent to ninety-two per cent?

A. That is right. Now, I will go on to the next item. [772] It is designated under segment No. 1 on Exhibit No. 62 as No. 7, "control piping and

(Testimony of William Edward Joslin.)
special valves." It is also under the piping system, which, as I mentioned, is designated as segment No. 1 of this exhibit. The Power Service Corporation's schedule shows that they proposed to start on October 11th and complete on November 10th, according to their schedule—that is, their proposed schedule, allowing thirty-one calendar days, or an average of 3.22 per cent completion per calendar day. On October 27th, the date on which the last tubes, water-wall headers and drums were in place, the Power Service Corporation's schedule shows seventy per cent of the work completed.

Q. Will you show that on Exhibit No. 62?

A. Yes. Right here (indicating), seventy per cent complete on October 27th.

Q. On the date shown here (indicating), if you follow up that line does that show the percentage of work completed on that particular date, on each item on Exhibit No. 62?

A. Yes, sir. This represents the dates, the calendar days, and this (indicating) is the percentage. It is all reflected on this exhibit.

Q. In the upper righthand corner is the percentage? A. Right here (indicating).

Q. And down here at the bottom (indicating) are the calendar days? [773]

A. Yes; these are the dates. Here is the month and here is the first day of the week (indicating), the third, eighth, thirteen, eighteenth, and so on.

Q. And the same general plan is carried out?

A. Yes, sir; that is right. On this item we just

(Testimony of William Edward Joslin.)

talked about, which is item No. 7, had they continued to maintain their own schedule they would have completed the work in ten days from October 27th.

Q. And as of November 10th what was the amount of completed work?

A. They were 92 per cent complete on November 10th.

Q. So that they picked up between October 27th and November 10th what percentage of the work?

A. Twenty-two per cent. Now then, this chart shows the over-all proposed completion of the work listed under "piping system."

Q. You are referring now to the Plaintiff's exhibit, the same one we have been using?

A. Yes, sir; the second line down from the top, under segment one it shows the over-all percentage of completion.

Q. Of what?

A. The entire items included in the piping system. Of course, as we said at the beginning, we have eliminated the miscellaneous items. We have taken their proposed progress [774] as of October 27th, the last date on which all of the drums, tubes, and water-wall headers were in place. They proposed to be—this mark here (indicating) is the proposed schedule and this is the actual work (indicating).

Q. You are referring now to what?

A. To the little figures above the cross-hatching. They are the proposed figures of completion on a

(Testimony of William Edward Joslin.)
given date, and below this bar, or line here (indicating) represents the actual percentage of completion on the given date. On October 27th the Power Service Corporation proposed on the over-all of the items under the piping system to be ninety-five per cent completed on that date. Now, that is reflected in their over-all schedule as shown on their exhibit, and it is shown on our exhibit "V" which is an enlargement of their own graph. Theirs shows their proposed completion of ninety-five per cent on that date, and their over-all completion actually was ninety-five and seventy-eight one-hundredths.

Q. How do you arrive at that figure?

A. By taking the individual units and making a total and then you divide the value of the unit—the individual unit, to get the percentage as of any date.

Q. When you mention values, are you taking the same values in evidence on Exhibit No. 62?

A. Yes, sir. [775]

Q. And where are they reflected in Exhibit No. 62?

A. In the second column from the right, or, rather, the second column on the righthand side of the exhibit.

Q. Those values, where do they come from?

A. They are the figures as submitted by the Power Service Corporation.

Q. As the proposed break-down of the various segments?

(Testimony of William Edward Joslin.)

A. Yes; of that particular segment.

Q. And—

Mr. Gibson: May I have the letter of August 10th?

The Court: Before you go on to something else, Mr. Gibson, I would like to ask the witness a question. You say ninety-five and seventy-eight one-hundredths per cent completion. Now, what does that mean in additional days?

A. That is covered by their own schedule.

The Court: But I don't want to figure it out, and I was asking you.

A. It is difficult on that to figure it, because they have required a greater period of time to complete the last five per cent.

The Court: But based on their progress chart what would it amount to in days?

A. On the progress chart it would have amounted to 16 days, but I didn't average it because of the fact that the last five [776] per cent they are asking fifteen days, to complete the last five per cent; so we take their proposed schedule as of that date which they proposed at that time to be ninety-five per cent.

The Court: That is on October 27th?

A. Yes.

The Court: What was the percentage as of that day? A. 95.78 per cent.

The Court: What does that figure per day?

A. It won't be reflected here, because they have asked for 15 days to complete, beyond this.

(Testimony of William Edward Joslin.)

Q. (Mr. Gibson, continuing:) When they figure their schedule they arrive at 95 per cent on this particular date (indicating)? They arrived at that on a percentage—a certain percentage of completion per day? A. Yes, sir.

Q. Between 90 per cent and 95 per cent, they required five days to complete that five per cent?

A. Yes, sir.

Q. And you say between 95 per cent and 100 per cent they required fifteen days?

A. Yes; they asked for that.

The Court: What I want to know is the percentage [777] per day that they should have completed under their own proposed schedule. What percentage per day?

A. You would like to know what percentage per day they should have completed?

The Court: Yes.

A. I will have to figure that.

Q. (Mr. Gibson, continuing:) Now that is this over-all line upon which there was ninety-five per cent scheduled on October 27th?

A. They were on schedule on that date.

Q. With reference to that date, that is an average of these other items?

A. That is a composite average of these various segments. That is what they proposed.

Q. That is what they proposed to follow?

A. Yes, sir.

Q. This whole job as to that segment would be ninety-five per cent complete on that date?

(Testimony of William Edward Joslin.)

A. Yes, sir; and they were on schedule on that date. All they had to do was to maintain their own schedule from that date on.

Q. Now, Mr. Joslin, this is Exhibit "W"?

A. Yes.

(Whereupon document referred to was marked Defendant's Exhibit "W", for purposes of identification.) [778]

Q. (Mr. Gibson, continuing:) Calling your attention to this proposes Exhibit "W", will you identify that?

Mr. Watts: I have no objection to it.

The Court: Then it may be admitted, without objection.

(Whereupon Defendant's Exhibit "W" so marked for identification, was admitted in evidence.)

Q. (Mr. Gibson, continuing:) Mr. Joslin, will you describe Defendant's Exhibit "W" for the record?

A. This exhibit is an enlargement of the auxiliary equipment as represented by the Power Service Corporation's schedule of segment six, which is headed, "Auxiliary equipment," and it is exhibit No. 62. It is composed of items, one, two, three, four, five and six; the last drums, tubes and water-wall headers for the boilers were placed on October 27th. The Power Service Corporation's schedule shows that item one, which is designed as "Ash handling system," on exhibit No. 62 under segment six, auxiliary equipment. On October 27th

(Testimony of William Edward Joslin.)
the Power Service Corporation's schedule shows that 93 per cent of this work was completed.

Q. As of what time was that?

A. That was on October 27th.

Q. I meant to say what item was that?

A. That was item No. 1, the ash handling system, under auxiliary equipment, on Exhibit No. 62.

Q. Can you show us where that figure is shown on Exhibit No. 62?

A. Yes, sir. That is shown on Exhibit No. 62. It is reflected on the date of October 27th, 93 per cent, and between the dates of October 29th and November 5th there was no operation on this particular work.

Q. You mean by that that there was no work on the ash handling system?

A. Yes, sir. Had the Power Service Corporation worked one or two Sundays they would have completed this ash handling system before November 10th.

Q. That is according to their own proposed schedule?

A. Yes, sir.

Q. And what percentage was completed on November 10th?

A. On November 10th they were 98 per cent completed.

Mr. Scholz: You said, I believe, if they worked one or two Sundays they could have completed some part of that work?

A. Yes; there were two Sundays during this time where there was no operation.

(Testimony of William Edward Joslin.)

Mr. Scholz: During this period of time?

A. Yes; from October 27th, between there, there was no operation on these two days.

Mr. Scholz: And these two days were Sundays?

A. Yes; and had they worked one of the two Sundays they would have completed that part of the work. Now then, on item No. 2, it is designated as "De-aerating seed water heater," under segment six of the auxiliary equipment. On the Power Service Corporation's schedule, which is exhibit No. 62 it is so designated. We don't need to go over that because it is completed. The next item is No. 3 under segment six of the auxiliary equipment, and it is listed as "boiler feed pumps and drives."

Q. Let me ask you, Mr. Joslin: The item before that, Item No. 2 was one hundred per cent completed as of what date?

A. As of October 20th, it was one hundred per cent complete. Now then, back to Item No. 3, which I said was designated as boiler feed pumps and drives; on Exhibit No. 62, which is the Power Service Corporation construction schedule it shows that the boiler pumps and drives required eight days to complete, or an average of 12.5 per cent completion for each calendar day between the dates of July 27th and August 3rd.

Q. That is according to their proposed schedule?

A. Yes. On October 27th the date that the last drums, tubes and water-wall headers were in place, the Power Service Corporation was ninety-eight per cent completed with the boiler [781] feed pumps

(Testimony of William Edward Joslin.)

and drives, and on November 10th they were 98.5 per cent completed. In other words, they had completed five-tenth of one per cent between October 26th, or 27th, and November 10th, and, of course, their schedule called for 12.5 per cent completion per calendar day.

Q. (Mr. Gibson, continuing:) Just go right ahead now, Mr. Joslin.

A. The next item is item No. 4 "Miscellaneous piping." It is item No. 4 on the auxiliary equipment, which is segment No. 6 of Plaintiff's Exhibit No. 62. The proposed date on the construction schedule of the Power Service Corporation is between July 29th and August 31st,—I am wondering if I have that one in the wrong place,—no; that is correct, the item No. 4. The Power Service Corporation's schedule shows the dates, as I said, between July 29th and August 31st, a total of thirty-four calendar days to complete this work with an [782] average of 2.94 per cent completion per calendar day. They started on July 29th, and on October 27th they were 98 per cent completed on that work, and if they had maintained their own schedule they would have completed in one day, or on October 29th, the work would have been completed, but on November 10th they were 99 per cent complete. In other words, between October 27th and November 10th they completed one per cent of this work. Now, shall I go on with the next item?

Q. Yes; go right ahead.

A. The next item is item No. 5 under segment

(Testimony of William Edward Joslin.)

No. 6 of "Auxiliary Equipment," on Plaintiff's Exhibit No. 62. It is listed as "Miscellaneous pumps and equipment." The Power Service Corporation's proposed schedule shows operation on this work between July 31st and September 30th, a total of sixty-one calendar days within which to complete the job.

Q. According to what?

A. According to their own proposed schedule. It shows sixty-one calendar days, with an average of 1.64 per cent completion per calendar day, and on October 27th, the day on which the last drums, tubes and headers were in place the Power Service Corporation was 95 per cent complete on this work, and by maintaining their own schedule they would have completed this work by October 31st, but on November 10th [783] they were ninety-eight per cent completed, or they had shown a completion of three per cent of the work between October 27th and November 10th.

Q. That is on the basis of one shift?

A. Yes, sir; one shift, and I might add here that their schedule shows that they started this work before the date their proposed construction schedule shows. They started this work on July 25th, and none of this material was missing, or delivery delayed, or any shortage of material.

Q. Now, then the next item, Mr. Joslin?

A. The next item is "Combustion control instruments." On their proposed schedule, which is Exhibit No. 62, it shows the operation on that as being between October 7th and November 10th.

(Testimony of William Edward Joslin.)

Q. What does their proposed schedule show?

A. That is what it shows. That was what I indicated. It shows the date of operation on this work between October 7th and November 10th. It further shows twenty-five days at one shift to complete this work after 45 per cent of the work has been installed on October 27th, the date on which the last drums, tubes and headers were in place. At that time the Power Service Corporation was 45 per cent completed with this work, and maintaining their own schedule, and working two shifts between October 27th and November 7th, they would have completed [784] their schedule in twelve days.

Q. Have you any schedule to show what percentage they proposed to complete?

A. Nothing except that they completed in between October 27th and November 10th twenty per cent, and they were to require twenty-five days, according to their own schedule on one shift; so on the two shift basis they would have completed in twelve days, or by November 7th.

Q. Does that cover all of the items, Mr. Joslin?

A. That covers all of the items, all of the incomplete items on the proposed progress schedule.

Q. Now, Mr. Joslin, to summarize this, will you just stand up and point to Exhibit No. 62 and reiterate the phases on which you have charts covering the specified segments,—have you enlarged charts covering every phase of the work referred under Exhibit No. 62, or are there some missing?

A. We have covered every segment, or phase,

(Testimony of William Edward Joslin.)

of the work, with the exception of some completed items. They were completed prior to November 10th, and also the miscellaneous piping, and the boiling out of the boilers.

Q. Before the recess the court asked if you would ascertain something in reference to the number of days required in connection with the completion of items,—I forget the number, or whether it was the over-all construction as shown on your exhibit “V”. Will you please refer to Exhibit “V” and [785] see if you correctly understood the Court, and are prepared to answer his query now?

A. On Exhibit “V” the Power Service Corporation showed on their own chart the over-all percentage of completion between the dates of July 17th and November 10th, a total of one hundred seventeen days, for an average completion of .85 per cent completion per calendar day.

Q. Eighty-five hundredths of one per cent in a day?

A. Yes, sir.

The Court: If they followed their own schedule, what would be the number of days required?

A. Twelve and a fraction days beyond October 27th. Now, that is covering the entire group of items.

Q. (Mr. Gibson, continuing:) However, they did allow themselves fourteen days, or fifteen days, to complete?

A. Yes, sir.

Q. To complete that five per cent?

A. Yes, sir.

Q. Because as of October 27th their own pro-

(Testimony of William Edward Joslin.)

posals shows that they intended to do 95 per cent of the work by that time, and in fact they were 95.78 per cent complete? A. Yes.

Mr. Watts: This over-all that you are speaking of, that was so far as the piping was concerned?

A. Yes. [786]

The Court: Then that made a difference of only one and a half days on that? You say it would require twelve and a fraction days?

A. Yes, sir.

The Court: I would like to have this witness give me the different items that their proposed schedule mentioned of work that was started ahead of the proposed date of construction, and completed prior to the proposed date of completion.

Mr. Gibson: And I would also like to have the witness compare this with the progress chart of an earlier date, say, in the middle of the construction, and point out what appears on this chart, and also on an earlier chart.

A. I neglected to state before that we did not make a chart for the insulation or the pipe covering. The reason was that there was no shortage of pipe covering material, and it was the Power Service Corporation's responsibility to see that work was kept up with their own schedule. It was subcontracted.

Q. You didn't make a chart of that?

A. No; I did not do that. His Honor asked if there was anything else that was not in there, and that, of course, was not included. There was no excuse,—

(Testimony of William Edward Joslin.)

Mr. Scholz: (Interposing:) Probably that would [787] be a conclusion to say that there was no excuse for something.

A. There was no shortage of any of this material.

Q. (Mr. Gibson, continuing:) Could that have been done simultaneously with the installing of the water-wall tubes and headers, or was it necessary to wait for the completion of some part of that work before this could be started?

A. No; that was insulation of the pipe work, and it did progress up to October 27th at which date the pipe work that was to be insulated was up to their proposed schedule.

Q. The insulation of what now, are we referring to?

A. The insulation of the pipe work. It should have all been in accordance with their proposed schedule.

Q. The operation of that work had nothing to do with any lack of materials, or the fact that the headers or the water-wall tubes were late in arriving?

A. No, sir.

Q. I am calling your attention, Mr. Joslin, to exhibit No. 56 and 58, which purport to be both of the same general character. They are what?

A. Progress schedules.

Q. Now, with reference to these schedules, there are certain numbers, or percentages, of completion, and proposed completion. Take the schedule that you have been working on there and point out to

(Testimony of William Edward Joslin.)

the Court how the numbers are changed, the various numbers. [788]

A. The numbers which show,—

Q. (Interposing:) Let me complete my question, Mr. Joslin: Take the schedule which you have been working on and point out to the Court how the numbers change, the ones carried underneath the black performance line, in each item, so that it will be possible for the Court to get it in mind as to the varying situations as to the percentages shown. A. Yes. Now, this chart,—

Q. (Interposing:) Which chart is that?

A. Exhibit No. 56. It is rendered on September 29th, 1944. The first item listed is "Main and auxiliary high-pressure steam," and it shows on this date that is, on September 29th, 1944, as being 87.4 per cent completed on that item.

Q. Above that line is there another number or figure which indicates what the contractor proposed to have completed?

A. Yes. Not on exactly the same date, but on September 24th, the contractor proposed to be 80 per cent complete.

Q. With the same item that you spoke of just now the main and auxiliary high pressure steam?

A. Yes, sir. There is no report on September 23rd, but there is a report on September 29th, which shows that on the 29th of September there was 87.4 per cent completion, and to average this back, there would be about one per cent per day. [789]

Q. Then they were up with their proposed schedule?

(Testimony of William Edward Joslin.)

A. They were a little ahead of their proposed schedule on this item. Now, we will take this date, October 13th, which is two weeks later,—

Q. (Interposing:) Now, what exhibit is that you are referring to now?

A. That is exhibit No. 58.

Q. That is referring to the same item?

A. The same item. They submitted another chart, however, showing the main and auxiliary high pressure steam as being the report on October 13th, and on that date it shows this work as being 93.6 per cent completed. They advance from 87.4 per cent to 93.6 per cent complete by October 13th.

Q. On what item is that?

A. That is the percentage progress on the main and auxiliary high pressure steam.

Q. Why isn't that black line brought out further on this exhibit?

A. They have stopped their black line at this point (indicating) for reasons that I don't know.

Q. If the black line indicates the percentage of completion, should not the black line reach to the number of the percentage, or to the number indicating the percentage of completion? [790]

A. It should have been carried out to the percentage but they have not carried the black line out on this exhibit.

Mr. Watts: On this item, item No. 1 of Segment No. 1 on the date in question, was the plaintiff ahead of schedule or behind schedule?

A. On this item he was behind schedule.

(Testimony of William Edward Joslin.)

Mr. Watts: That is right. The schedule shows here (indicating), the black line shows the actual performance and the cross-hatch shows what it should have been.

Q. (Mr. Gibson, continuing:) At the end it shows 93.6 per cent; does that indicate what the plaintiff,—what the completion was, or what it was on that particular date? Perhaps that is not clear. This 98.6 per cent, or, rather, 93.6 per cent, does that indicate the end of the job?

A. What it was on that date. This shows the previous week here, October 6th.

The Court: I believe I understand this chart fully now.

Q. (Mr. Gibson, continuing:) Then, Mr. Joslin, the numbers under this line change from time to time to show definitely the progress?

A. That is right.

Q. I am calling your attention now to Plaintiff's Exhibit No. 10, being a letter dated August 10th, 1944, [791] addressed to Cory, Joslin & Macnsons, Sunflower Ordnance Works, Lozier, Broderick & Gordon, Post Office Box 36, Kansas City, Missouri, and in about the middle of the page it says: "Progress estimate break-down." Will you explain to the Court what this is?

A. Yes; this is an instrument which is addressed to Cory, Joslin & Macnsons, and Lozier, Broderick & Gordon, Post Office Box 36, Kansas City. It is dated October 10th,—I mean August 10th, and is marked as Plaintiff's Exhibit No. 10, and represents

(Testimony of William Edward Joslin.)

the value break-down of the various items covered by their contract.

Q. Do these items shown here in this exhibit as the break-down value appear at the righthand side of the proposed progress schedule?

A. I do not know that they show in the same proportion. I would not know that unless I checked one against the other.

Q. If certain elements in the break-down are combined on the progress schedule there, the sum total would be the full figure put in on any segment?

A. Well, that would be an assumption, Mr. Gibson. I would not know.

Q. The total amount of that is the estimate, or the plaintiff's bid of \$448,000 for the work?

A. Yes, sir. [792]

Q. The total estimate on the progress schedule which you have before the Court, particularly plaintiff's Exhibit 62, calling your attention to the exhibit which was on the board, and which was Exhibit No. 62, on the right hand side there are sets of figures. One of them indicates, at the top, a total of \$448,000.00, which is right here (indicating)?

A. That is the total amount of the contract.

Q. And to the right is the percentage figure representing one hundred per cent?

A. That is correct.

Q. And down through the column which is headed one hundred per cent are the breakdown of

(Testimony of William Edward Joslin.)
percentages, and under the column headed "\$448,000.00" that contains a breakdown of that figure also. Now, does each figure represent the breakdown according to the plaintiff's estimate as to the cost of any particular segment of the work, opposite the amount of the figures there?

A. Yes; they do, with one exception. There is a typographical error on the item of "brickwork," which is item No. 4 under boiler No. 2. They have it in the breakdown as \$3,050.00. That is a typographical error. It should have been \$9,050.00, as it is represented on boiler No. 3 and boiler No. 1. The total of these items at the top will show that the proposed figure was \$9,050.00 and not \$3,050.00. [793] That was a typographical error, but the total of each segment at the top of the various segments total the amount of \$448,000.00.

Q. Have you prepared a graph, or a chart with reference to the labor situation from the payroll on the boilers? A. Yes, sir.

Q. Have you that available?

A. I have up to certain given dates.

Q. This is for illustrative purposes only?

A. That is correct.

Q. And it is based on what?

A. It is based on the report,—the payroll reports of the Power Service Corporation.

Q. And it has been marked as defendant's Exhibit "X"? A. Yes, sir.

(Whereupon document referred to was marked Defendant's Exhibit "X", for purposes of identification.)

(Testimony of William Edward Joslin.)

Mr. Gibson: At this time I offer defendant's Exhibit "X" in evidence.

Mr. Watts: I have no objection, if the Court please.

The Court: It may be admitted.

(Whereupon Defendant's Exhibit "X", so marked for identification, was admitted in evidence.)

Mr. Watts: Does that represent the names which [794] appear on the payroll of the plaintiff as working on the boilers, or does it represent the names, or number of men, who were actually working for the Power Service Corporation on the job at that time?

A. This represents the boilermakers and boiler-makers' helpers, only.

Mr. Watts: O. K.

Q. (Mr. Gibson, continuing:) This came from the payrolls of the Power Service Corporation?

A. This Exhibit "X" is made up from the payroll reports submitted by the Power Service Corporation.

Q. Which have been offered in evidence as Exhibits "J," "K," and "L," I believe?

A. That is right.

Q. Now, go ahead and explain that, Mr. Joslin.

A. On July 23rd the first report shows one superintendent and a twenty-man crew, a boiler crew of twenty men. Boiler No. 1 at that time was,—

Q. (Interposing:) Is that the end of a payroll period?

(Testimony of William Edward Joslin.)

A. Yes. The first period submitted. Boiler No. 1 at that time was fifteen per cent completed. Boiler No. 2 was five per cent completed. On July 30th it shows that they had increased, that is, the Power Service Corporation had increased their man-power to one boiler superintendent and twenty-six [795] crew, that is, a crew of twenty-six boilermakers and helpers. Boiler No. 1 at that date was twenty per cent completed, and boiler No. 2 was eighteen per cent completed. The next period, August 6th, which is covered by this report (indicating), and it is made from a report submitted by the Power Service Corporation, it shows one superintendent and a thirty-nine man boiler crew. Boiler No. 1 at that time was forty-five per cent complete; boiler No. 2 was thirty-five per cent complete. On August 13th, the report shows one superintendent, a forty-eight man boiler crew, and it also shows that boiler No. 1 was fifty-nine per cent complete, and boiler No. 2 was forty-eight per cent complete. On August 20th the report shows one superintendent, a forty-seven man boiler crew. It shows that boiler No. 1 was sixty-seven per cent complete; boiler No. 2 was fifty-five per cent complete, and boiler No. 3 was two per cent complete. On August 27th, the report shows one superintendent and a fifty-one man boiler crew. It also shows boiler No. 1 ninety per cent complete; boiler No. 2 sixty per cent complete; Boiler No. 3 eight per cent complete. On September 3rd the report shows one superintendent; fifty-two men in the boiler crew; it shows boiler No. 1 as ninety-

(Testimony of William Edward Joslin.)

six per cent complete; it shows boiler No. 2 as sixty-five per cent complete; and boiler No. 3 as fifteen per cent complete. On September 10th, the report shows one superintendent, [796] and a fifty man crew on the boilers. It shows boiler No. 1 to be 99.9 per cent complete; it shows boiler No. 2 to be sixty-six per cent complete; and boiler No. 3 to be forty per cent complete.

Q. Those figures are taken from what source with reference to the percentage of completion?

A. From the progress schedules.

Q. That were submitted by the Power Service Corporation?

A. Yes, sir.

Q. And these are periodical reports as to the payroll?

A. Yes, sir.

Q. They were. Now, go ahead, Mr. Joslin.

A. On September 17th, which is the next date, it shows one superintendent, a fifty-eight man crew on the boilers; boiler No. 1 shows as 99.9 per cent complete; boiler No. 2 shows seventy per cent complete; and boiler No. 3 is at that time is fifty-five per cent complete. Boiler No. 1 is the same as on the previous report. No further operation as between those two reports is shown. The next date is on September 20th. This shows that the last water-wall tubes were delivered, but they did not increase the force at all, and on September 24th, the date of the next report, it shows one superintendent, fifty-eight crew men, and it shows boiler No. 1 as still at 99.9 per cent completion; boiler No. 2 at [797] seventy-six per cent completion, and boiler No. 3 at sixty per cent completion. October

(Testimony of William Edward Joslin.)

the first, is the next report, but there is a date shown there as September 26th, when the last water-wall headers delivered. In the report of October first it shows one superintendents, fifty-eight in the crew, and it shows boiler No. 1 as 99.9 per cent complete; boiler No. 2 as 88 per cent complete, and boiler No. 3 as 58 per cent complete.

Q. But Mr. Joslin, this report of August 24th shows boiler No. 3 at sixty per cent completion, and the report of October 1st shows it as only fifty-eight per cent complete. Now, that is going backwards?

A. That is no doubt a typographical error, and that should be,—

Q. (Interposing:) What date are you talking about now?

Q. (Mr. Gibson, continuing:) Now, you may go ahead. I think we were on the report of October the first?

A. On October first, Power Service Corporation shows one superintendent, fifty-eight men in the crew. It shows no further work on boiler No. 1, still being carried at 99.9 per cent complete: it shows boiler No. 2 at eighty-eight per [798] cent complete: and boiler No. 3 at seventy-eight per cent. The dates don't correspond exactly with these dates.

What dates are you talking about now?

A. As shown on Exhibit "X". As between the dates on these two reports it might vary one or two per cent. On October 8th, which is the date of the next report, it shows one superintendent, fifty-eight men in the boiler crew; it shows boiler No. 1

(Testimony of William Edward Joslin.)

still at 99.9 per cent completion; boiler No. 2 at 95 per cent completion; and boiler No. 3 at eighty-seven per cent completion.

Q. That is not at any variance?

A. The variation does not apply to the figure: no, sir. That is constant. On this date it shows the percentage of completion as follows: Boiler No. 2, ninety-five per cent; boiler No. 3, eighty-seven.

Q. Does it show on that date less men working in the crew?

A. Yes; there are two less men in the crew.

Q. These little blocks that you have here (indicating) they represent one day?

A. Those are as explained over here (indicating). Here is the number of men; yes, and when you are proceeding with a line which is at right angles here it shows the superintendent and crew as comparing with this number. Under the heading of [799] "Superintendent and boiler crew," each block represents one man.

Q. Then as the curve goes up or down it represents a greater or a lesser number of men?

A. Yes, sir.

Q. Now, you may go ahead and finish your explanation.

A. On October 15th it shows one superintendent, fifty-six men in the boiler crew; it still shows boiler No. 1 as 99.9 per cent completed; it shows boiler No. 2 as 97 per cent complete; and boiler No. 3 as 96 per cent complete. On October 22nd the report shows one superintendent, forty men in the boiler crew; boiler No. 1, 99.9 per cent complete;

(Testimony of William Edward Joslin.)

boiler No. 2, 99.8 per cent complete; boiler No. 3, 99.7 per cent complete. On October 29th, the report shows one superintendent and twenty men in the boiler crew; it shows boiler No. 1 99.9 per cent complete; boiler No. 2, 99.8 per cent complete; boiler No. 3, 99.7 per cent complete. No further work on the boilers,—on the drums tubes or headers on any one of the boilers, beyond October 27th. On November 25th the report shows one superintendent and twenty men in the crew. It shows boiler No. 1 as 99.9 per cent complete; boiler No. 2 as 99.8 per cent complete; boiler No. 3 as 99.7 per cent complete. There was no further work on the water-wall tubes, headers or the drums. On November 12th, it shows [800] one superintendent, twenty men in the crew; it shows boiler No. 1 as 99.9 per cent complete; boiler No. 2 as 99.8 per cent complete; boiler No. 3 as 99.7 per cent complete; and no further work done on these drums, water-wall headers or tubes from that date.

Q. Now, Mr. Joslin, from November 12th, what was the first preceding report before that which shows any additional work?

A. From October 27th until November 12th the progress chart shows no work done on the drums, water-wall tubes or headers between those two dates.

Q. Calling your attention to the graph, why did you stop at November 12th? Was that as far as you had any reports?

A. Well, I didn't continue beyond that date because, according to our graphs, and to their own progress schedules, all the work was completed on

(Testimony of William Edward Joslin.)

November 10th, and we found no necessity to go beyond that date. The water-wall tubes, the water-wall headers were the only materials claimed to be missing and it was our intention to show that at the expiration of the contract no work was being done on the boilers.

Q. The expiration date of the contract, what do you mean?

A. As stated in the original contract, not including the modifications. [801]

Q. But the modifications took it through November 15th?

A. Automatically until the fifteenth of November; yes.

Q. Will you explain what is the purpose of the progress schedule,—the proposed progress schedule, such as the one offered and presented by the Power Service Corporation, as reflected in Exhibit No. 62,—I will withdraw that,—I call your attention now to Plaintiff's Exhibit No. 51, which purports to be a progress schedule. I will ask you to examine that and ask you if you have any information, or any recollection of having the progress schedule approved by your office?

A. I never saw this progress schedule prior to here in San Francisco.

Q. Then you cannot say at this time whether or not the items appearing on the segments included in Exhibit No. 51 are reflected on Exhibit No. 62 in a general way?

A. I assume that they are reflected here on ex-

(Testimony of William Edward Joslin.)

hibit No. 62. Now, without making an examination of the entire progress schedule,—the only ones that we have are approved progress schedules.

Q. And that is in the form covered by Exhibit No. 62? A. Yes, sir.

Q. Now, just answer my other question.

A. What was that?

Q. As to the purpose of a progress schedule.

A. A progress schedule is usually prepared to cover the various segments of work involved in any contract. These segments are broken down into items, or amounts, in relation to the segments as a whole, or in relation to the particular job, or project, and combined the number of segments serve to create a unit as a whole, or a complete contract. On each item there is a proposed definite period of time in which they propose to install, or to perform, a certain piece of work. If, for example, one item would require ten days, the second item twenty days, and the third item may require thirty days,—

Q. (Interposing): You simply estimate these times for doing the work, or that particular part of the contract?

A. Yes; but it does not necessarily mean that you have to start a certain segment on a certain day, simply because you have marked that on your progress schedule, because conditions may vary throughout the contract, and you may find it to your advantage to start one segment on one date, and another on a date different than shown on the supposed schedule.

(Testimony of William Edward Joslin.)

Q. The purpose is to outline a proposed plan of operation?

A. A proposed plan of operation, and procedure, and for the purpose of securing payment on a monthly, or weekly, estimate, as agreed upon.

Q. How would the amount of money which was payable to [803] the plaintiff in this action, in conformity with the contract, be determined by reference to the progress schedule?

A. Well, you would take the different items on which a price is placed for the installation of that item,—

Q. (Interposing): Is each item on that progress schedule, or group of items, that are carried under anyone of the segments, is there a price reflected on the righthand side of that exhibit?

A. Yes; on this Exhibit No. 62.

Q. And is that for the purpose of determining the amount due the contractor under each segment?

A. Well, it is set out to represent one hundred per cent of that item, and payments are based upon the progress schedules, that is, based upon the difference between the previous payments as reported by the previous percentage shown of completion. If that is not clear, let me say it is represented by the difference between the previous percentage of completion, and the percentage of completion at the next date of submission.

Q. And that would be starting with the date the contract got under way, the first payment would be made in a month, or a week, or two weeks, or whatever time was agreed upon and had elapsed?

(Testimony of William Edward Joslin.)

A. That is correct.

Q. To determine how much money the contractor would get, [804] what reference is made to the schedule to determine that?

A. Well, if a particular item shows twenty per cent completion, you would be paid, or, rather, the contractor would be paid twenty per cent of the amount shown on the right hand column of the exhibit as to that particular item.

Q. Then that amount was the amount for one hundred per cent completion as set opposite the item?

A. That is correct, if one month would show twenty per cent completion, and the next month would show forty per cent, then the contractor would be paid forty per cent, less the twenty per cent shown previously, less any retainage.

Q. It requires a certain percentage to be held back?

A. Well, I am not so sure that this contract called for retaining any percentage. It may have, however.

Q. At any rate, when you say "retainage," you mean certain amounts held back which finally would be paid to the contractor?

A. That is right. It would be paid after the completion of the contract.

Q. With reference to the boilers,—the construction of the boilers as indicated on the construction schedule, Exhibit No. 62, can you determine from that the amount of money that the plaintiff allo-

(Testimony of William Edward Joslin.)

cated for the completion of boiler No. 1, boiler No. 2 and boiler No. 3? A. Yes, sir. [805]

Q. Now, what is that figure with reference to the first boiler? Just identify boiler No. 1, and tell us.

A. Well, boiler No. 1 of the steam generating unit, as shown under segment No. 3 of this exhibit, the proposed cost of the entire unit, including all the items of the segments, is \$59,850.00.

Q. Is there an item there that covers the boilers and tubes,—and in connection with that question, I want to call to your attention the chart that the plaintiff has offered in support of its claim of damage through loss of efficiency in the three operations; the three operations are the operations in connection with the completion of the boilers, tubes and water-wall headers.

Mr. Watts: I am frank to say if that is intended as a question I could not answer it myself. Possibly my client could. I am referring now to Exhibit 60, and for example, Mr. Borst's work covers all of that work which has been referred to as segment No. 1. There are eight classifications of work, plus part of the piping that was not covered.

The Court: Does this chart go to the loss of efficiency, the first operation as to boiler No. 1, the second operation as to boiler No. 2 and the third as to boiler No. 3?

Mr. Gibson: I think that goes to the actual construction or operation on the boilers, and not the tubes, water-walls [806] and headers in which the

(Testimony of William Edward Joslin.)

question of delay in delivery of materials was concerned, and not the question of the completion of the boiler itself. Of course, the water-walls, tubes and drums as contended by the plaintiff being delayed prevented these boilers from being finished and caused a loss of efficiency. Now, I understand this exhibit covers the whole boiler.

Mr. Watts. That is right. This chart which is hanging on this board (indicating), and referred to by the Court, is simply an enlargement of my Exhibit No. 62, or a portion of it, the latter part of that exhibit, which is now in evidence.

Q. (Mr. Gibson, continuing): Mr. Joslin, from your analysis of the progress schedule in connection with your recitals, by way of explanation of the charts which are offered in evidence, as to the time of completion of the work, and the time when the work could have been completed if the progress schedules had been maintained by the plaintiff, is it your opinion that this contract as a whole could have been completed so far as the plaintiff is concerned, by November 10th, or November 15th, or either of those dates? A. It is.

Q. With reference to either of those dates, is it your opinion that it could have been completed by November 10th?

A. I maintain that the job could have been completed with [807] a sufficient force of men by November 10th.

Q. Then, as a matter of course, with the additional five days there would be no reason to have so

(Testimony of William Edward Joslin.)

much overtime to finish the job by the fifteenth of November?

A. It would practically have eliminated overtime entirely, that other five days.

Q. From your examination of the schedule and your knowledge of the work that went on by the Power Service Corporation, what is your opinion as to what caused the failure to complete this work by either November 10th or the 15th?

Mr. Watts: I object to that as calling for a conclusion of the witness, and it is argumentative, if the Court please.

The Court: He may answer.

A. The primary reason was the lack of sufficient force of men, most of which could be laid to the insufficient number of bricklayers, insufficient number of insulation men for the pipe covering, insufficient number of pipefitters, and insufficient number of millwrights. The boilers were completed and I would not say there was an insufficient number of boilermakers.

Mr. Gibson: Mr. Borst stated that there were numerous shortages in connection with materials required to [808] complete the performance of their contract.

The Court: Isn't it agreed, gentlemen, that these shortages are not material, and that they did not delay the construction of this project?

Mr. Watts: We admit that, your Honor.

The Court: I think it is admitted, and has been several times, that no delay was caused by any shortage except of water-wall tubes and headers.

(Testimony of William Edward Joslin.)

Mr. Watts: That is correct. It certainly is. There is no claim by either party.

Mr. Scholz: By either party,—what do you mean by that, Mr. Watts?

Mr. Watts: I mean that Mr. Joslin nor us claim that this shortage, if there was a shortage of any other materials, caused any delay.

The Court: There is no claim by the plaintiff that these other materials were not there in good time.

Mr. Scholz: I understand that it is admitted and stipulated that the alleged delay was due only to the shortage of tubes and headers, if any, and by that we don't want to stipulate that there was a delay due to any shortage.

The Court: I understand the only contention of the plaintiff is that the damage was caused because all of [809] the water tubes and headers were not delivered on time.

Q. (Mr. Gibson, continuing): Calling your attention to Exhibit No. 4, which has been admitted, do you remember of having seen that letter, which I presume was received by your office, that is, the original was?

A. Yes; I remember the letter.

Q. As of July 26th, 1944, had an approved progress schedule been presented and approved by you, or the A.-E.-M.?

A. Not to my knowledge.

Q. Not to your knowledge? A. No.

Q. Is it your recollection, or your knowledge,

(Testimony of William Edward Joslin.)

that the progress schedule as finally presented was approved on what date?

A. I believe it was on August 22nd, 1944.

Q. That does not mean that August 22nd was the date upon which the Power Service Corporation presented it?

A. I don't know when they presented it.

Q. With this letter of July 26th in your possession, would it have been possible for you with the knowledge you had to determine what tubes were required by the Power Service Corporation to be delivered by August 1st, August 8th, and August 15th, or any other time? [810]

A. No; it would not, and I could not form any conclusion on that. It could be that they wanted all of the tubes.

Q. Assuming all of the tubes are included by that, does that comply with the requirement of the contract as to requisitions?

A. No; it does not.

Q. Would that letter give you any assistance in applying to the A.-E.-M., or to any other agency for aid in procuring tubes? Would it be any information upon which you could go to ask for tubes as requested in the general terms of the letter?

A. The only information that would give me would be notice that I would expect a requisition to follow,—to follow that letter, in which specific tubes would be requisitioned.

Q. Do you have any recollection as to when you

(Testimony of William Edward Joslin.)

received your first requisition for tubes, or when your office received the first requisition for tubes?

A. If my memory serves me correctly, it was August 19th, 1944.

Q. You said August 19th? A. Yes, sir.

Q. That was the date of the requisition?

A. Yes, that is, if my memory serves me correctly, it [811] was the date.

Q. I call your attention now to a carbon copy of requisition dated August 19th. It is material requisition No. 26, addressed to Cory, Joslin & Macnsons, and consisting of a number,—no; consisting of two pages, and is a part of plaintiff's Exhibit No. 20. I will ask you if that is the document that you were talking about, and were attempting to recall, or did recall?

A. That is the one; yes, sir.

Q. Prior to the receipt of this requisition in which certain items are specified,—will you just read a few of those, Mr. Joslin?

A. Yes. First, there is three each F-4-R-L three inch by twenty-hundredths furnace tubes,—these were all in relation to furnace tubes.

Q. And no water-wall tubes?

A. That is right.

Q. Is there anything in this requisition No. 26 that refers to water-wall tubes, if you can determine?

A. No; I see no reference to water-wall tubes, other than the fact that they are mentioned in this requisition.

(Testimony of William Edward Joslin.)

Q. You mean by that in the first paragraph, but not under the list of items requested?

A. In the first paragraph, yes. [812]

Mr. Gibson: The requisition reads as follows, after the address and date, and the subject,—the requisition is for the attention of Mr. Ralph J. Jung:

“Gentlemen:

“As a matter of record we wish to confirm our verbal advice on the shortage of water-wall tubes for boilers No. 1, No. 2 and No. 3. The tubes were found to be short on July 14th, 1944, and the matter discussed with Major Matthews, Captain Overesh, Mr. D. C. Smith of Lozier, Broderick & Gordon, and Mr. Ralph J. Jung of Cory, Joslin & Macnsons.

“These tubes to be furnished by Combustion Engineering Company are as follows,—”

And then it lists the items to which reference has been made.

Q. (Mr. Gibson, continuing): Are those the items you referred to, Mr. Joslin?

A. Yes. I might explain further that these tubes may have been on requisition before, and on previous requisitions as furnace tubes, and the plaintiff may have taken this off some information that he secured, and the tubes listed here may not have been furnace tubes.

Q. They are indicated as furnace tubes, but they may have been water-wall tubes; is that right?

A. Yes; they could have been tubes that related to that particular operation. [813]

(Testimony of William Edward Joslin.)

Q. Was that the first real requisition under the contract from the plaintiff to furnish materials in reference to the boilers,—particularly with reference to the tubes?

A. Received by our office; yes, sir.

Q. In connection with the erection of the three boilers, do you know how many furnace tubes would be required by the three furnaces and the erection of the boilers?

A. Combined furnace and boiler tubes would be about thirteen hundred and thirty per boiler,—approximately four thousand for the three boilers.

Q. And the water-wall tubes?

A. About seven hundred fourteen water-wall tubes.

Q. For the three boilers? A. Yes, sir.

Q. So that the actual shortage would not prevent the commencement of the installation at any time proposed, or contemplated, by the plaintiff?

A. No; the operations would be the supporting steel,—was the first operation; the drums, the second operation; the furnace boiler tubes and baffles the third operation; and the water-wall tubes, the fourth operation, at which time progress could be maintained on all three boilers.

Q. Do the progress charts show that progress was being made during that period of time? [814]

A. The progress charts show that progress was being made on three boilers, with the exception of one week on boiler No. 2,—the progress I am referring to involves the tubes,—on boiler No. 2 be-

(Testimony of William Edward Joslin.)

tween September 8th and September 15th; there was no operation on boiler No. 2 at that time, but progress was had on boiler No. 3, and between those dates the work had been completed on boiler No. 1.

Q. Calling your attention to requisition No. 22 in exhibit No. 20, which is dated August 17th, 1944, and is addressed to Cory, Joslin & Macnsons, which was prior to the exhibit which has just been shown to you, now, Mr. Joslin, do you recall having received that, or seeing it after it was received in your office? A. Yes; I saw this.

Q. Among other things, what does that cover with reference to tubes?

A. It covers various items, including water-wall tubes.

Q. Does it indicate from what source the requisition,—or, rather the information put in the requisition was compiled from?

A. Yes, it indicates that. It says: "We hereby confirm the following list of Combustion Engineering Company material shortages which was given to Mr. Neubauer of Hercules on August 11th, 1944, by Mr. Elmer Bennett, erector of the Combustion [815] Engineering Company."

Q. And then follows what?

A. Then follows the list of tubes.

Q. After that list there is also another list?

A. Yes; after that list there is another list, "The following list of Combustion Engineering Company tube shortages was given to Mr. Neubauer of Hercules on August 5th, 1944 by Mr. Elmer

(Testimony of William Edward Joslin.)

Bennett, the Combustion erector," and then there is a list of tubes.

Q. And that requisition — the first paragraph starts out with a clause indicating that this list was furnished by someone else?

A. That is right. This was not a result of any inventory.

Q. Will you just read it?

A. Yes. "Gentlemen: We hereby confirm the following list of Combustion Engineering Company material shortages which was given to Mr. Neubauer of Hercules on August 11th, 1944, by Mr. Elmer Bennett, Erector of the Combustion Engineering Company."

Q. And this is requisition No. 22, which was the first you received on this matter—you were in error as to the 19th of August being the date?

A. Yes.

Q. This requisition does not purport to be a result of [816] any inventory taken by the plaintiff as to actual materials being absent, or any material on the site?

A. No; it does not.

Q. Until you had a list and requisition in your possession was there anything that you could do in expediting the materials involved in that requisition of August 17th, covering the items involved in that particular requisition?

A. Until we received this requisition there was nothing that we could do toward expediting the materials, no, sir; not until we received the requisition stating what they wanted.

(Testimony of William Edward Joslin.)

Q. In your opinion, did this requisition of August 17th comply with the terms of the contract as to giving sufficient details to identify the equipment—was it within the terms of the contract?

A. I would say it would be within the terms of the contract, if that information could be developed from the requisitions.

Q. It does not make any difference where the information comes from, if it sufficiently describes the articles wanted to enable your force to take steps to procure the materials?

A. Yes, sir; that is right.

Q. As compared to the letter of July 26th,—

A. (Interposing:) I don't think there is any comparison, or any connection, between the two. The last was a requisition, and we certainly could not order on the first one. [817]

Q. During the full course of your operations with the plaintiff in the performance of his contract, did you and your force under your direction cooperate to try and obtain the materials requisitioned by them as rapidly as the materials could be procured?

Mr. Watts: I object to that. I think that calls for a conclusion. Let him state what was done.

The Court: I think I will let him answer.

A. We most certainly did.

Q. At the time the requisition dated August 17th arrived were you at that time at Sunflower?

A. That I am not sure of. I was at Sunflower in August prior to the twelfth, but I left Sun-

(Testimony of William Edward Joslin.)

flower for a trip to Minneapolis and returned to Sunflower. The exact date of the trip to Minneapolis and the date of my return to Sunflower I am not positive about.

Q. If there is an exhibit signed by you about the 12th of August would that have been signed at Sunflower, if it is headed Sunflower?

A. Yes, sir.

Q. Another letter in which you replied to Mr. Wedlick, with reference to the Fegles Construction Company's letter—it indicates on the letter head which is dated Aug. 28 that it came from San Francisco. Was that letter sent from San Francisco?

A. That letter was sent from San Francisco.

Q. The contract in this case has a clause, being Article Sixteen of the contract—the formal contract itself, it is on page 8-F, and is as follows: "This subcontract shall be subject to the written approval of the A-E-M, and the Contracting Officer, and shall not be binding until so approved." Have you any explanation as to the purpose of that clause?

A. All contracts were subject to the approval of the Contracting Officer at Sunflower. No contract could be let without his prior approval on the work covered. The contracting officer would not be presented with the contract for approval prior to the time it had been approved by the A-E-M, therefore the wording is, "This contract shall be subject to the written approval of the A-E-M, and the contracting officer, and shall not be binding until so approved." It means that it shall be ap-

(Testimony of William Edward Joslin.)

proved by the A-E-M, and submitted to the contracting officer for his approval.

Q. The presentation of this contract for signature to the Power Service Corporation was by letter of transmittal on July 14th in which they were directed to sign it. Now, before it was returned was that approval of it given by the A-E-M, or was that later?

A. It would have to have been approved by the A-E-M, and [819] the contracting officer prior to the mailing of it to the Power Service Corporation.

Q. The purpose of holding back—the written approval of the formal contract—strike that, please. Do you have any explanation as to what the plaintiff must do at the time of signing that contract to show his acceptance and compliance?

A. I don't quite get the question.

Q. I will put it this way, Mr. Joslin: At the time of the filing, do they require that the plaintiff furnish a type of bond to the Government, a performance bond?

A. A bond is called for in the specifications, and would have to be supplied by the plaintiff, and that bond would have to be approved by the A-E-M, or the contracting officer, or both, before the contract could be finally signed, but the mailing of the contract would comply with the award, and the contract would be in force pending the final approval of the bond.

Q. Calling your attention to page 1-17, sub-

(Testimony of William Edward Joslin.)

division 2-01, I will read it to you: "Order of work. The work shall be carried on at such locations and in such order of precedence as may be found necessary by the constructor. The location and limits of the work to be done shall be plainly indicated by the constructor.

"B. The subcontractor will be required to conduct [820] the work in such manner that other work in progress will not be unduly delayed. He shall cooperate and work harmoniously with other contractors at the site to the end that all of the work may be completed as expeditiously as possible." Particularly the first paragraph which I read, does that authorize you as the constructor to vary the conditions and the actual performance schedule with reference to the beginning and the completing of any item of the proposed progress schedule?

A. Do I understand you to ask if we had that authority?

Q. Yes.

A. Yes, sir.

Q. The progress schedule as proposed by the plaintiff, and accepted by the A-E-M, and approved by the Area Engineer as to completing certain segments which were to be done on certain dates, or to be commenced on certain dates, is there anything about that that is inflexible?

A. No; it was within our authority to change the work order of the Power Service Corporation, if in our opinion it was necessary to do so.

Q. With reference to the change orders for

(Testimony of William Edward Joslin.)

items of work, did the defendant, or, rather, the plaintiff, in his examination state that it was not necessary to increase the time for the modification because all of the work could be [821] done simultaneously with other work in the contract—now, assuming that was true, and he did so testify, was it possible that this could be done in view of the nature of the change orders?

A. You mean could it have been done before November 10th, the period they claim, and they refused to take the extra time because they claimed they could have done both the main contract and the modification. Now, it is difficult for me—

Q. (Interposing:) Can that answer be yes or no? A. No.

Q. Why?

A. I do not understand how a change order issued in the latter part of November or fore part of December could be completed prior to November 10th.

Q. I am reading now from page 6-1 of the contract, subdivision; 6-02, under subparagraph one, the following clause (c): "In general it is in the intention and purpose of this subcontract to provide for the completion of Power House No. 1 in its entirety, starting with the structure in its existing stand-by status, performing all work and doing all things necessary, except as specifically specified to be done by others, and finishing with a completed power plant ready for the acceptance and operation in accordance with the full intent

(Testimony of William Edward Joslin.)

of the plans and these specifications. Various [822] units of the work are as of the date of this sub-contract in varying stages of completion. The fact that one unit has been carried, by others, to a greater degree of completion than other similar adjacent units is not to be construed to mean that additional work will be performed by others on such similar units." Now, in conformity with the first part of that clause, did the Power Service Corporation, with the exception of the items that were eliminated from their contract, did they complete their contract within the time specified in the contract? A. No.

Mr. Watts: During the intermission I have talked with counsel and asked if they would mind if we put Mr. Borst on the stand at this time to answer the two questions that were held over, for the reason that he would like to go home tonight, if the Court can release him?

The Court: If it is agreeable with counsel, he may take the stand and then he may be excused.

Mr. Gibson: It is agreeable with us.

Mr. Scholz: Yes; that is agreeable with me.

W. LYLE BORST,

recalled as a witness on behalf of the plaintiffs, having been previously duly sworn, testified as follows:

Further Cross Examination

By Mr. Gibson:

Q. One of the questions was on what date you had the greatest number of boilermakers as distinguished from helpers, what date that was, and what was the number of men?

A. On the third of October, 1944, we had a total number of thirty-six boilermakers proper, which did include the boilermaker superintendent.

Q. The superintendent, lead men and foremen?

A. Yes.

Q. The foremen, lead men, superintendent and boilermakers, as distinguished from helpers?

A. Yes, sir.

Q. That was on October third?

A. Yes, sir.

Q. A total of thirty-six? A. Yes, sir.

Q. The other question was, over the period of time from the sixth, or possibly from the thirteenth of August, how many names of the boilermakers that you lost off your payroll by voluntary relinquishment as distinguished from your termination [824] of their work?

A. I found there were four men, Mr. Biggs—

Q. (Interposing:) Give the names, will you Mr. Borst?

(Testimony of W. Lyle Borst.)

A. Mr. Biggs, Mr. Napier, Mr. Robertson, and Mr. Armoto.

Q. There was a question in my mind as to Mr. Green?

A. I haven't Mr. Green shown under that.

Q. We have Mr. Green, but I ruled him out as not being under this heading. Does your record show when he terminated? A. No, sir.

Q. Then we agree on the four, and possibly Mr. Green, which would be the fifth?

A. Yes.

Mr. Gibson: That is all.

Mr. Watts: That is all.

The Court: Then this witness may be excused?

Mr. Gibson: I have no further need for him.

Mr. Watts: Then he will leave tonight.

(Witness excused.)

WILLIAM EDWARD JOSLIN,

recalled as a witness on behalf of the defendants, having been previously sworn, testified as follows:

Direct Examination (Continued)

By Mr. Gibson:

Q. The break-down that we were talking about right after [825] we resumed after the adjournment at two o'clock shows certain sums allocated for certain phases of the work? A. Yes, sir.

Q. Now then, have you analyzed that progress schedule as it has relation to this chart which is an enlargement of part of exhibit of No. 65?

(Testimony of William Edward Joslin.)

A. Yes, sir.

Q. Will you explain the difference in your analysis from the analysis of the plaintiff in claiming a loss of efficiency?

A. Yes, sir; I will. To me this one hundred per cent (indicating) on enlargement of exhibit No. 65, represents the cost of the first boiler, and this figure one hundred and five per cent is flexible, that is a flexible figure and it could be seventy-five per cent, or it could be one hundred fifty per cent, depending on the accuracy of the estimate of the contractor. A contractor may figure the cost of a unit at one hundred per cent, and his figure may be the actual cost. Again he may figure it at a certain figure of so many dollars, and it may be more, or it may be less; so this is variable. It could be off considerable if his estimate was off. It could be one hundred per cent, if the estimate on the unit work was accurate. If his estimate was low it could be one hundred and twenty-five per cent. If [826] his estimate is high it could represent only seventy-five per cent, or any other percentage. Now, this is important on this unit, because it represents the same cost on No. 2 that the contractor spent on No. 1, and this, No. 3, or the third operation likewise shows that the cost on No. 3, or the third, was the same cost as experienced on the first and second operations. Now, this was not a sequence operation. The progress schedule, which is represented by exhibit No. 62, shows that simultaneous operations were to be carried out on these three

(Testimony of William Edward Joslin.)

items, or the three boilers. The operations were to be at the same time. According to their progress schedule they proposed to start operation on the first boiler on July 19th; on the second boiler, on July 20th; on the third boiler, on July 25th. That is a simultaneous operation, and would take them from July 19th to July 25th on the three operations. It would take that time, possibly, to recruit a sufficient force to start operations on the three boilers. As reflected on their exhibit 62, the plaintiff has made an allowance for No. 1, or the first operation on this exhibit, in the amount of—well, for example here on this item, “tubes drums and headers,” he has an allowance on this exhibit—

Q. (Interposing:) Now, on what item is that again, Mr. Joslin?

A. Tubes, drums and headers—in the amount of \$32,800.00. [827]

Q. And for what is that?

A. The installation of the tubes, drums and headers.

Q. On what?

A. The first operation, and he likewise has estimated this same amount, \$32,800.00 right to the dollar, that he expects to charge, and to be paid, for the second operation. Now, the third operation, by this time they would have accumulated a force for the first and second operation, and they would distribute the efficiency through there, and it would hardly be likely that they would be less efficient on the third operation than on the first two op-

(Testimony of William Edward Joslin.)

erations, these being, as I say, simultaneous operations, and instead of decreasing the cost on the third operation—and, of course, I would assume that the operation on the third would be held up until the first two had progressed sufficiently so that good men could be taken from these and put on the operation of the third unit, and you will note by the exhibit that the contractor has allowed for the third operation \$33,400.00 as against \$32,800 for the operation on units one and two.

Q. He has allowed more for the third boiler than either of the other two?

A. That is correct. Now, on this chart they are shown as duplicate items, in operations one, two and three. He has allowed the same identical sums and percentages for the three, [828] all three of them. I don't understand how he can figure any loss of efficiency on that.

Q. In his estimate he set aside the same money for the first and second boilers, and a larger sum for the third?

A. That is right, a larger sum for the one operation of setting the drums, tubes and boilers, for duplicate operations.

Q. Therefore, this is less than shown by plaintiff's exhibit here?

A. Yes, this would show that he has actually gained some efficiency over his estimate by maintaining the same costs that he did here and here (indicating). These two costs are set down as identical, and this one larger, and on this exhibit the

(Testimony of William Edward Joslin.)
column "Units actually used," are identical on all three operations.

Q. Then he gained, if that is a true picture—he gained over his estimate?

A. Yes, sir. He estimated more money to complete operation No. 3, or boiler No. 3, and with the same number of men he has all three operations completed, with no additional cost.

Mr. Gibson: Does the Court understand the theory that Mr. Joslin is explaining, by using the two exhibits, No. 62 and No. 65?

The Court: Yes; I think I fully understand it.

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, what was [829] the steam—the power house steam, which was generated? What was that to be used for? What was the purpose of it? We have talked a lot about it, and I think the Court would like to know what its purpose was.

A. The steam from Power House No. 1 was primarily for the use in process work in manufacturing explosives at Sunflower.

Q. There has been testimony in the record to the effect that some of the headers—the water-wall headers were improperly fabricated with three and one-half inch openings to retain or accommodate three inch tubes, or a fraction over three inches—I am not positive as to that—but there is some testimony to the effect that the openings were too large, and that they were delayed, according to the contention of the plaintiff, a period of time

(Testimony of William Edward Joslin.)

from some time in the latter part of September until October 18th awaiting a welder from the Combustion Engineering Company?

A. Yes, sir; I believe that is correct. There was such evidence.

Q. Will you state to the Court whether or not that was an error in fabrication that could have been ascertained with reasonable diligence prior to the time the plaintiff started actually putting the tubes in that part of the boiler set-up?

A. Yes, sir; that could be ascertained prior to the time that you worked up to it. There is a difference—quite a [830] difference between three and a half inches and three inches, particularly if you are rolling tubes in that header. As I understood it, there were some nine tubes in that header, and it could have been discovered prior to the time of working right up to it. It is excusable, and maybe an oversight—as I say, an excusable oversight in not noticing it prior to the time you worked on the header; but you should see it prior to the time that you get right up to it.

Q. Is that a part of the business, Mr. Joslin, and is it considered a hazard of the contracting business that you may find at any time?

A. You may find a defect in any manufactured equipment. It is a normal hazard.

Q. Do you figure that you, as an individual, are responsible, or that there was any neglect on your part that brought that condition about?

A. No, sir; absolutely not.

(Testimony of William Edward Joslin.)

Q. I call your attention to Exhibit No. 25, which is a letter dated November 10th, 1944, from the Power Service Corporation to your organization, Cory, Joslin & Maensons, for the attention of Mr. Wedlick, regarding the completion of Power House No. 1. Now, that exhibit No. 25 purports to be a photostatic copy of a document. I will ask you if you have the original of that document?

A. I do. [831]

Q. Now, will you compare the lower lefthand corner—the stamp mark, on the original, and on the photostatic copy and tell me what date that letter was received in your office?

A. To the best of my knowledge and belief it looks like November 21st, 1944, but there is an imprint of the letter “W” that makes it very difficult for me to see the date.

The Court: What do you think it is, Mr. Gibson?

Mr. Gibson: “21” or “27.”

Q. (Mr. Gibson, continuing:) Are you familiar with the contents of this letter of November 10th?

A. Yes, sir.

Q. It states in there the dates on which the water-wall tubes would be required, and also the date of delivery, and the number of days late, and it also states in there that there was a delay occasioned—I will read this:

“A delay was also occasioned by the fact that certain other water-wall headers on Boiler No. 2 were fabricated in error and necessitated a modification of the tubes which connects to the header.

(Testimony of William Edward Joslin.)

Work was held up on this boiler from September 30th until October the 18th."

"From the above it is apparent that the progress of our work has been delayed through factors beyond our control. We, therefore, request an extension to our [832] contract completion date to December 15th.

"In making this request for additional time of completion we do not waive any rights which we have claim for additional compensation due to such delays. These claims would be in accordance with the paragraph appended to the contract which provides for such claims."

Is it your understanding this was not received until after the date set for completion of the contract?

A. It is my contention that was not received until November 21st, not earlier than November 21st, 1944.

Q. And the final modification with reference to the time was not itself disposed of until long after the plaintiff had completed and left the area—the modification which finally instead of giving it an extension, dated it back to the tenth of November?

A. That is right.

Q. After the last clause was denied by your organization they requested, or a request was made, to date the completion date back to November 10th?

A. That is correct.

Q. In regard to this exhibit No. 25, a letter of

(Testimony of William Edward Joslin.)

November tenth, had you received any notice prior to that time that there was some question of a claim for additional compensation due to the delay in delivery of water-wall tubes? [833]

A. As I remember, we had never received any direct information from the Power Service Corporation of any claim that would be filed prior to that time.

Q. You are mindful of the letter of July 19th—was that the date?—indicating possibly some additional expense would be incurred on the six weeks delay?

A. I received correspondence which incorporated a number of items of expense, totaling approximately \$41,000.00, which was prior to August 12th, but no claim was submitted for that amount of money.

Q. Was it based upon that general relationship that you had with the Power Service Corporation that you addressed a letter to the Area Engineer suggesting that this contract be cancelled?

A. It was. I found that in my files while I was at Sunflower.

Q. You didn't receive it? You mean by that that it came during your absence?

A. I found that estimate in our files, but they had not made any claim at that time, nor prior to November 21st, but I discovered the estimate in our files and that letter was a direct result of that discovery.

Q. Mr. Joslin, you have heard the statement

(Testimony of William Edward Joslin.)

made here that they were delayed under their contract by virtue of [834] the late arrival of the tubes, headers, and—I mean, of the boiler tubes and headers. Is it your opinion that the boiler tubes were late in being delivered to the site in connection with their requisition therefor?

A. I believe that the boiler tubes were delivered as quickly as it was humanly possibly to do so, and in sufficient time to permit the Power Service Corporation to complete their contract within the contract limit of time.

Q. As a part of the claim for damages there is claimed reimbursement for rental of equipment between November 10th and December 19th—or some time in December/ I am not just sure now of the date. From your estimate of the progress of the work that was done, and could have been done, was it necessary for construction equipment to be maintained there at the site of the plant after November 15th?

A. There was no occasion for equipment for the erection of the boiler—that is, for the boiler tubes, drums and headers—the water-wall headers. There was no occasion for that equipment to be maintained on the site after October 27th. Beyond that date, had the Power Service Corporation maintained their progress schedule they would have completed their work entirely on or before November 15th, at which time there would have been no occasion for equipment of any kind on the site.

Q. In your opinion was there any delay in the

(Testimony of William Edward Joslin.)
delivery of the absent of the materials from the time you received the requisition therefor?

A. I admit no delay at all. I admit, however, that there was time required to secure the materials, but I don't admit any delay in securing that material.

Q. Is there anything in the construction schedule that you testified concerning that designates a time at which any specified material must be delivered, or should be delivered, to the plaintiff for the operation,—in other words, is the construction schedule a material requisition?

A. Are you referring to this exhibit No. 62 now?

Q. Yes; that will do as a progress schedule. We will refer to exhibit 62.

A. There is no specific time that any material must be delivered. It does represent a time on which the Power Service Corporation proposed to start their operation on any given item under certain segments.

Q. In reference to the boilers, I believe they had some four thousand tubes available at that time to start work with, at the time specified in their schedule?

A. Yes, I think that is right.

Q. Mr. Joslin, I didn't learn until today what tube rolling meant. Perhaps I am imposing as to the Court's lack of knowledge [836] on this, but I will,—

The Court: You are not imposing on the Court at all. You go right ahead.

Q. (Mr. Gibson, continuing:) Would you mind

(Testimony of William Edward Joslin.)

then, Mr. Joslin, explaining what tube rolling means in connection with the erection of a boiler?

A. Well, a tube is cylindrical affair that is bent to fit between the drums. It is expanded into the drums with a tube expander.

Q. At the point that it goes into the drum, now what happens?

A. It is expanded in the drum.

Q. By the use of an instrument?

A. A tube roller.

Q. Just go right ahead.

A. Well, they set them and expand them into the drum. All of this is termed "tube rolling."

Q. Is that carried on by the boilermakers themselves?

A. Boilermakers usually spend about one half of their lives rolling tubes. This is done by the boilermakers; yes. The boilermakers' helpers finally roll tubes, or they would not become boilermakers.

Q. Working as a helper,—first, the boilermakers, or journeymen do tube rolling, and the helpers bring the tubes, [837] and help put them in place?

A. Yes; the boilermakers' helper he works along with the boilermaker, under the boilermaker's jurisdiction. He puts the tubes in place.

Q. There has been a question here of sequence of operation. Will you explain the sequence of operation in connection with this boiler operation, such as involved here.

A. On a boiler erection job you have, first, the foundation, the supporting steel, the erection of

(Testimony of William Edward Joslin.)

the drums, the tubes, the baffles,—the water-wall tubes and the baffles, and the next is the closing of all of the openings,—letting the air out and filling the system with water, and making the hydrostatic tests. You put pressure on it. That is a factor of safety. You put two and a half or three times the operating pressure, and if there is any leak that develops they are re-rolled. The brickwork is then completed,—

Q. (Interposing:) Is that after the test?

A. Yes,—of course, there is a certain part that is erected, or installed, during the erection of the job, but the brickwork cannot be completed entirely until after the hydrostatic test. There are certain casings that go along with the brickwork.

Q. Is the proposed sequence of operation broken up more than outlined,—do you think it might be broken up [838] where a crew of men put in the tubes,—the side-wall tubes on one boiler and proceeded to the next boiler and did that work?

A. If you work in series you have a simultaneous operation. You understand that ninety per cent of the work on the erection of a boiler is setting and rolling of the tubes, and the setting of the drums. The setting and installation of the steel,—that operation, if there was no steel erected at all, it would only represent a very small percentage of the erection of the boiler. You would not erect the steel on the first and then go to the second and then go to the third and erect the steel and then discharge that crew after the steel is erected. You

(Testimony of William Edward Joslin.)

just go right ahead and set the drums,—you set the supporting steel and set the drums. There was one set of drums, I understand by the Combustion Engineering Company that was done incorrectly and was re-set by the Power Service Corporation. That is comparatively a simple operation. You line the drums and the water-walls and start to rolling the tubes. Now, these boilers that we are talking about are twelve feet apart, and I cannot see why a man working on one boiler and rolling the tubes on that and then working on another boiler twelve feet away and rolling the tubes would be more efficient on the second boiler.

Q. By the extension of time from November 11th to December [839] 19th, or whatever the date was in December, was it possible for the plaintiff to develop a better sequence operation than it would have been had all of this work been demanded of him in the period of time encompassed in the provisions of the contract, that is, I believe including the modifications, November 15th?

A. I would say that the extension to December 19th had no connection with the boiler at all, because the drums, tubes and headers were all completed on October 27th, and the extension of time to December 19th would have no effect whatever on this sequence of operation.

Q. Calling your attention to paragraph 1-10, subdivision (b), on page 1-6 of the contract, which reads: "The subcontractor shall furnish sufficient forces, construction plant and equipment, and shall

(Testimony of William Edward Joslin.)

work such hours, including night shifts, overtime operations, and Sunday and holiday work as may be necessary to insure the prosecution of the work in accordance with the approved progress schedule. If, in the opinion of the constructor, the subconstructor falls behind the progress schedule, the subconstructor shall take such steps as may be necessary to improve his progress and the constructor may require him to increase the number of shifts, over-time operations, days of work, and/or the amount of construction plant, all without [840] additional cost to the constructor." That clause contemplates that if such extra time was demanded it would increase the cost burden on the plaintiff?

A. That is correct.

Q. In this instance did you demand that the plaintiff put on premium labor in order to complete this contract within the time specified by its terms?

A. No, sir; we did not.

Q. Why?

A. Well, I will be glad to explain that to your Honor: We had the highest respect for Mr. Borst, myself and all of my men. I complimented him when he left there. It was not my desire, nor the desire of any of my men to increase the cost to the Power Service Corporation by compelling them to put on premium labor. We would never have considered doing so. They were doing an excellent job, and we were satisfied, and the contracting officers were satisfied, and until such time as the contracting officer would call on us to force the Power Serv-

(Testimony of William Edward Joslin.)

ice Corporation to put on additional men, and to work premium labor on such days as it was called for, we would not do so.

Q. In this case you heard testimony that the contracting officer quite frequently visited that area and this building, as well as other items in the area that we were building. Now, [841] you say there was no demand by him to you to order that done?

A. There were several visits by the contracting officer, and he had a representative on the site. We frequently visited Power House No. 1, and they never once requested that we request Mr. Borst to put on premium labor.

Mr. Gibson: Mr. Watts has agreed with me that instead of writing all of these exhibits in the Reporter's Transcript, that the Reporter might make a notation that Exhibit so and so was received, and at this point was a part of the Reporter's Transcript.

The Court: I can tell you gentlemen now that I have just gone through one of these cases involving construction of one of these government plants. It was a case that took us a considerable time to try and it had a great number of exhibits like this one, and when I started to go over that transcript I found that it was much easier to have the exhibits copied into the record. I don't know whether you have ever tried digging out a particular exhibit from a great many others while you were trying to prepare a brief, or read a transcript.

Mr. Gibson: I was just thinking that it would

(Testimony of William Edward Joslin.)

be an unnecessary thing to do, to copy the exhibits two or three times in this one transcript, the same exhibit.

The Court: Of course, I can see your point, and [842] I think the Reporter will take care of that in the best manner possible. I do know this, however, that in reading a transcript if reference is made to an exhibit it would also be a bit inconvenient to try and find where it was copied in the transcript before.

Mr. Watts: Of course, we will have this done in any manner the Court would prefer.

Mr. Gibson: And that is our attitude.

The Court: I think you men need have no worry about this. If these exhibits are copied more than once in the transcript, I think you will find the additional cost will be a very minor amount.

Q. (Mr. Gibson, continuing:) Mr. Joslin, I believe that possibly it was after we adjourned, and it may not be a part of the record, but the Court asked you to check these charts for certain information. Will you state what the Court asked, that is, what his question to you was, and if you have the information requested?

A. Yes. The Court asked me to establish the list of items, such as were started prior to the progress schedule indication, and finished prior to the progress schedule date, [843] that is, the items that were started prior to the date as indicated on the chart, and finished prior to that date. On the piping system, which is segment one on the chart,

(Testimony of William Edward Joslin.)

Exhibit No. 64 I have now, and it would be the same on the one I had the other day when I was testifying, which I think was Exhibit No. 62—under segment one, item four, that was started prior to the progress scheduled time, and completed after the progress schedule. Item No. 5 under segment one was started prior to the time indicated on the progress schedule as starting time, and it was completed after the time indicated by the progress schedule. Item No. 6, which is the drain vent and trap piping, that was started before the progress schedule, and completed after.

Q. This line on the chart that indicates the proposed progress steps were the hatched lines?

A. That is right, and this line should have been continued out, this black line should have been completed.

Q. The cross-hatched lines show the percentage proposed to be completed at certain dates?

A. Yes.

Q. At the time they were to be completed with this work, what percentage of the work was actually completed?

A. In this instance about ninety-eight per cent.

Q. And what was to be the completion date?

A. Yes, sir; that is correct.

Q. And if the information shown on this chart was correct that line would have been extended out beyond the hatched line—I mean the black line would have been extended beyond?

A. The black line would have been extended out

(Testimony of William Edward Joslin.)

here (indicating). That would be the representation of the work completed; yes, sir.

Q. And Item No. 6 shows that it was started before the proposed date and completed after?

A. Yes, sir.

Q. And Item No. 7 shows that it was started before the scheduled date and completed after, that is, the control piping and special valves?

A. Yes, sir; and segment No. 2, pipe covering and insulation, the chart shows that was started before the scheduled date and completed after. On Boiler No. 1, which is segment three, item No. 2, the pulverizers, exhausts, burners, soot blowers, that item was started before the scheduled date and completed after. Item No. 4, boiler exterior casings, was started before the progress scheduled date and completed after. Item No. 5, ash and soot hoppers, was started before the progress scheduled date and completed after. Item No. 6, ash hopper lining, was started before the progress scheduled date and completed after. Item No. 7 was started before the progress [845] scheduled date and completed after, and that is listed as "induced and forced draft fans and drives." Item No. 8 under the same segment was started before, or prior to, the progress schedule and completed after. On Boiler No. 2, segment No. 4, item No. 2, air heater tubes, that item was started prior to the progress schedule and completed prior to the progress schedule. That is the only item that was completed prior to the progress schedule. Item three was started

(Testimony of William Edward Joslin.)

prior to the progress schedule, and completed after. Item No. 4 was started prior to the progress schedule and completed after. Item No. 5 was started prior to the progress schedule and completed after. Item No. 6 was started prior to the progress schedule and completed after. Item No. 7 was started prior to the progress schedule, and completed after. Item No. 8 was started prior to the progress schedule and completed after. Item No. 9 was started prior to the progress schedule and completed after. Under boiler No. 3, segment No. 5, item No. 4, which is the pulverizer, exhauster, burner, soot blower, that item was started prior to the progress schedule and completed after. Item No. 5 was started prior to the progress schedule and completed after. Item No. 6 was started prior to the progress schedule, and completed after. Item No. 8 was started prior to the progress schedule, and completed after. Under the auxiliary equipment, which is segment No. 6 on the [846] exhibit, Item No. 1 was started prior to the progress schedule and completed after. Item No. 3 was started prior to the progress schedule and completed after. Item No. 5 was started prior to the progress schedule and completed after. Item No. 6 was started prior to the progress schedule and completed after. I might explain on segment No. 3, which is Boiler No. 1, Item No. 8 was started prior to the progress schedule and deleted from the contract, and later it was reinstated before they completed the contract, but that was a separate contract by Hercules to the Dow Chemical Company.

(Testimony of William Edward Joslin.)

The Court: What relation did the starting of these different items which you have mentioned have with the water-wall tubes and headers? Would they be delayed on account of the water-wall tubes and headers?

A. Yes, sir; certain items would be. The brickwork, which would be Item No. 3 on boiler No. 1, indicated as segment No. 3, and the boiler casing, that is the exterior casing, which is item No. 4 under boiler No. 1, segment No. 3, Item No. 5, which is ash and soot hoppers; Item No. 6, under boiler No. 1, which is segment No. 3, ash hopper lining; on boiler No. 2, segment No. 4, item No. 4, the brickwork. Item No. 5, the boiler exterior casing; item No. 6, the ash and soot hoppers; Item No. 7, the ash hopper lining; on boiler No. 3, segment No. 5, Item No. 5, the brickwork; Item No. 6, [847] boiler exterior casing; Item No. 7, ash and soot hoppers, and possibly some on Item No. 9. It would be, however, a very little on Item No. 9, which is "hot and cold air and gas ducts."

The Court: How do you account for this work being started ahead of the production schedule, when naturally they would be delayed by the delay in the delivery of tubes?

A. On boiler No. 2 and boiler No. 3 they would have been delayed, but they had sufficient tubes for boiler No. 1. They had sufficient tubes to go along with boiler No. 1, and on boiler No. 2 and No. 3 they could have placed their men to doing what they could do up to the time that the boiler

(Testimony of William Edward Joslin.)

tubes had arrived, and the only men affected by that would be the boilermakers who do the setting of the drums, tubes and headers. They set the ash and soot hoppers. They set the casings. The boiler-maker at all times has sufficient work to keep him going. They kept their crew up until three days before the last tubes and headers were delivered to the job. They had just reached their peak crew on the boilers.

Q. (Mr. Gibson, continuing:) Now, Mr. Joslin, while you have this exhibit 64 there before you, does the record show that the explanation made was based on exhibit No. 64, which is the final construction schedule, and report, made by the plaintiff in this action?

Mr. Watts: None of these charts were made by the [848] plaintiff, but by the A-E-M.

Mr. Gibson: The data on these charts was compiled from the production percentages that the plaintiff reported in.

Mr. Watts: Yes, to Mr. Neubauer, who made the estimates. You understand, however, we are not questioning the accuracy of this schedule.

The Court: I had the thought in mind that there is some evidence here that there was a delay in completing the water-wall tubes and headers. Under your production chart, however, it shows that you completed some of the work ahead of schedule, so that necessarily it might follow that while you were delayed on the tubes and the headers you were able to go ahead with the other work.

(Testimony of William Edward Joslin.)

Mr. Watts: That is true, and the progress chart so shows.

Q. (Mr. Gibson, continuing:) I believe Mr. Borst made an explanation in the early stages of his testimony about the broken line and the black single pen line across page one, both of which start at the zero mark, extending up. Will you explain, Mr. Joslin, just very briefly, what those two sets of figures indicate, and what they are connected with. This is Exhibit No. 64, now.

A. Yes; this is Exhibit No. 64. The black solid line [849] represents the curve of the proposed progress of the installation, and it starts at zero percentage, that is, the percentages are marked on the left hand side, or the left hand two-thirds of the chart, probably the left hand one-third of the chart.

Q. Above what date does that start?

A. July 17th.

Q. And that is Exhibit No. 64?

A. Yes, sir; No. 64. And this (indicating) represents the percentage. The numbers above the date of July 5th—no; it is nearer above the date of July 10th; starting from the second black or dark line from the bottom of the page represents the percentages and goes from zero to one hundred.

Q. And that is represented by numbers of ten's, that is, ten, twenty, thirty, forty, fifty and so forth, to a hundred?

A. That is right. And the top line represents the overall of the various segments. The figures above the crosshatch represent the proposed completion at various dates.

(Testimony of William Edward Joslin.)

Q. For the entire job?

A. Yes, sir; the overall, and intersecting these lines are a point which represents the dates they propose to have a certain percentage completed. Above the cross hatch on the top line directly under the words "Power Service Corporation, Sub-contract No. 5-5, Completion of Power House No. 1—Now [850] where that intersects with the figure ten on the bottom line, **that represents the percentage of completion that they proposed, and that would be on August third.** They proposed to have ten per cent completed, and on this date over here (indicating), which would be September 13th, they proposed — or possibly on September 12th — these figures are rather small—no; it would be on September 13th—this is the intersection here (indicating). That point would represent the date on which they proposed to have fifty per cent completion, and with the other line—this one starting here, the dotted line, that shows the actual percentage, starting with July 17th it shows the actual percentage of completion as compared to the proposed completion. This line here (indicating), the dotted line, as compared to the other, or the proposed completion as of any particular date.

Q. Each little square this way represents one per cent? A. Yes, sir.

Q. And each square, the other representing a date going this way (indicating)?

A. Yes, sir.

Q. So they would have completed one and seven-tenths per cent between these dates?

(Testimony of William Edward Joslin.)

A. No, sir; from this date where the line intersects across here (indicating), that would be ninety-six per cent [851] completed, which would be on November 27th, and on December 19th they had completed four per cent, between those dates.

Q. According to that schedule, how long did it take to complete the last one per cent?

A. On this date, November 7th, they were ninety-nine per cent complete—I should have said December 7th, not November 7th—between then and December 19th they completed one per cent.

Q. Will you state if there was any question of absence of materials in doing any work on the tubes—does the chart show that they were up to schedule?

A. On August 19th they proposed to be sixteen per cent complete—no; not sixteen, I should say twenty-six per cent complete, but they actually were $20\frac{1}{4}$ per cent complete on that date.

Q. At that time there was some complaint that they were delayed, but to the third and eighth of August the findings of fact says they could not have used the tubes if they had them. Now, will you tell us what per cent they were complete by the eighth?

A. They proposed to be 14 per cent complete, and they actually were ten per cent.

Q. And how much on the 28th of August?

A. They proposed to be 37 per cent complete, and they [852] actually were thirty per cent complete, and on the 26th of October, the date that the last—

(Testimony of William Edward Joslin.)

Q. (Interposing:) Does that show the 26th, or the 28th?

A. On the 28th of October when the last drums, tubes and water-wall headers were completed, they were at that time eleven per cent behind schedule. That is on the date the last drums, tubes and water-wall headers were in place. That is indicated by the intersecting of the percentages at the left over here (indicating), with this pen line, and at the top of the chart that represents the percentage completed at any particular date shown at the bottom of the chart. Here (indicating) it shows what is the proposed percentage of completion, and on this line the actual percentage of completion.

Q. And that is also indicated by this dotted line. All proposed percentages are designated at the top of the over-all heavy black line?

A. And is reflected on this line (indicating).

Q. Indicating a certain point at which certain percentages will be completed, while the dotted line shows the actual daily status of the job?

A. That is right.

Q. Was Power House No. 1 equipped with electric lighting facilities which would permit night work.

A. Yes, sir. [853]

Q. Was one hundred and twenty days a reasonable time within which to perform the proposed contract that the Power Service Corporation has under litigation here?

A. I would say it was a reasonable time.

Q. Is there a difference between the term "se-

(Testimony of William Edward Joslin.)

quence of operation," as applied to the erection of a single unit, and "sequence of operation," as applied to a duplicate operation, or applied to two or more units of the same character?

A. I think I have explained that before.

The Court: I think that is right, and explained it very well.

Q. (Mr. Gibson, continuing:) In the findings of fact reference is made to delay in replacing two water-wall tubes, and the cost of these items—did you ascertain the cost of those two headers that were delayed, or the cause of delay?

A. Yes, sir; the cost was \$810.00.

Q. Both of the headers?

A. Yes; for both of the headers.

Q. Under what date did the Power Service Corporation acknowledge receipt of Notice to Proceed under the contract, which is the subject of this litigation?

Mr. Watts: I introduced that in evidence. It was on July 13th.

A. Yes; I think that is right, July 13th, 1944.

Q. Were progress payments to the Power Service Corporation held up, and if so, for what period?

A. On the Government contract all progress payments are held up until such time as satisfactory bonds have been submitted and approved by the contracting officer on any contract; until such time as these bonds are submitted and approved no

(Testimony of William Edward Joslin.)

payments are made, and no payment was made to the Power Service Corporation.

Q. And what was the reason for holding this up?

A. They were held up pending the approval of the bonds and the signing of the contract.

Q. Did the Power Service Corporation pay any money, or other thing of value, or agree to pay any money or other thing of value, as a consideration for the addition of the clause which it added to the bottom of the signature page of the formal subcontract?

A. That would be impossible for me to answer. I know they didn't pay anything to me.

Q. I am asking about you, Mr. Joslin?

A. They paid nothing to me.

Q. The Power Service Corporation, did they render any additional service or agree to render any additional service beyond what was required to be rendered by them under the general specifications as a consideration of the clause added [855] by it to the signature page of the contract?

A. That is the same question. Not between they and I; no, sir; there was none.

Q. Did the Power Service Corporation suffer any detriment or agree to suffer any detriment as a consideration for the addition of the clause which they had added to the form of the contract on the signature page at the bottom?

A. Not to my knowledge.

Q. Assuming, Mr. Joslin, that the Power Serv-

(Testimony of William Edward Joslin.)

ice Corporation learned about July 14th, 1944, that some of the water-wall tubes required for the completion of its contract were missing, and assuming that these tubes were believed by the Power Service Corporation to be important to their completion of the contract and the construction of this power house, how long should it have reasonably taken the Power Service Corporation to determine and prepare a list of the number of missing tubes, and make a requisition for them?

A. With a sufficient number of men they should have been able to determine the missing tubes within a week's time.

Q. How many tubes would they have to count to determine the missing number?

A. Approximately seven hundred fourteen.

Q. What would have been a reasonable time within which to complete the inventory required by Section 5-04 of the [856] specifications?

A. Well, we made an estimate prior to the letting of this contract, and we figured we could have prepared an inventory of everything in the power house within three weeks.

Q. Then three weeks is the answer?

A. Yes, sir.

Q. Was the inventory prepared by the Power Service Corporation by September 9th, 1944?

A. No, sir.

Q. What were "punch" lists, as that term is used in connection with construction work?

(Testimony of William Edward Joslin.)

A. Punch list is a misnomer. They are actually deficiency lists.

Q. What purpose do they serve?

A. When a segment of work is presumed to be completed it is reported to the inspecting force, the engineers of the A-E-M, and they send their engineer to make a final inspection of that work, which has been listed as ready for inspection, and any defects in material, or improper installation, or omissions, are noted, and they are placed on what is known as a "punch list," and presented for correction, to the particular contractor.

Q. And the contractor is required to rectify the errors within the terms of the contract? [857]

A. On the work within the contract he is supposed to rectify it at his own expense, for which time is automatically allowed. We just finished a job out at Mare Island for the Navy, and we had some boiler feed pumps, and we called for an inspection. Under the actual test the casing busted. We were fourteen months getting the casing, but the job was actually completed as of the date of inspection, and then we were automatically granted the extension until we got the casing.

Q. The contract was completed except for that item?

A. That is correct. The item which I had to replace at my own expense.

Q. What is your understanding of the term, "nearly all," as used in paragraph 5-04, subdivision (c) of the specifications?

(Testimony of William Edward Joslin.)

A. The term "nearly all" means just what it says in the findings of fact.

Q. Is that your interpretation? A. Yes.

Q. Mr. Borst stated that he interpreted it as meaning merely minor items. Have you any reason to disagree with that statement?

A. Definitely, I have. The minor items he states as bolts, nuts, gaskets, and so on. If those were the only items missing, there would have been no need to mention them [858] in the specifications. They could have been gotten at any time. We have those, all the bolts, gaskets, piping, flanges, nuts and so on that you can count. We had the facilities for the manufacture of our own flanges.

Q. According to the statement—I think it was of Mr. Borst—there was some question as to the use of equipment and shifting it from boiler to boiler as the work progressed under their progress schedule indicating simultaneous work on three boilers. Did they have enough equipment to complete this job under simultaneous construction?

A. No; they did not, not to operate on all phases of the boiler work on boilers one, two and three at the same time. They did not have sufficient equipment to operate in that manner.

Q. Under the terms of their contract they were to supply adequate equipment to take care of the contract?

A. They did supply equipment. Tube rolling operation requires a minimum of equipment. You have a hoist, but you have most of the tubes raised

(Testimony of William Edward Joslin.)

by hand blocks. They had the necessary equipment. These tubes are only twelve feet apart.

Q. Was there any shortage of equipment by the Power Service Corporation in connection with the performance of their contract?

A. No; I would not say that, but they didn't have sufficient equipment to operate on all three boilers without shifting the [859] equipment, and that would have to be done even at twelve feet between. I would not say they had a shortage of equipment, however, because they didn't.

Q. Was it necessary for them to use rented equipment after the tenth of November on that job, assuming that they were delayed so they didn't complete until December, under what you have explained as a contract that could have been performed before November 15th, and also taking Mr. Borst's list of machinery which he says was there in the last thirty-nine days? Was there any need for this rented equipment?

A. The boiler—the last boiler tubes and headers were completed on October 27th. That was actually completed. Now, there was no occasion to keep any tube rolling equipment beyond that date. If they had equipment for other items which were still incomplete that would have to be rented, I presume, until they were completed. My contention is that if they had followed their progress schedule and maintained their progress schedule, they could have completed all of the work before November 15th.

Q. Considering the status of the job as of No-

(Testimony of William Edward Joslin.)

vember 10th, was it necessary to keep the rented equipment beyond that date?

A. It was necessary to retain any equipment other than that required for rolling tubes, or installing the headers.

Q. Do you know what a Model "A" Beaver Pipe & Bolt Machine is? [860]

A. Yes, sir.

Q. What would be the normal life of a machine of that type?

A. On equipment of that kind and type, the maximum depreciation allowed is twenty per cent, which would establish a depreciation period of five years.

Q. In your experience with machines of this type, would it have a normal life of five years?

A. That would require the replacement of dies, but the normal life would be, I would say, about ten years.

Q. Do you know what Blackhawk Pipe Benders are? A. Yes, sir.

Q. Do you have any knowledge of the normal life of that type of machine?

A. Indefinite, you might say, with the exception of replacing dies.

Q. What would be the normal life of a Lincoln Welding Machine?

A. You are permitted to write off a machine of that kind in five years as depreciation, but the machine should be in good shape at the end of five years.

(Testimony of William Edward Joslin.)

Q. Do you know what a Yale Spur Gear Chain Hoist is? A. Yes, sir.

Q. Do you know the normal life, normal life usefulness of that article? [861]

A. About twenty years.

Q. Does that apply whether it is a one-ton or a one and a half ton?

A. There is no difference.

Q. You assume, of course, that it is used for the purpose for which it was intended? You assume that? A. That is correct.

Q. Would that apply also to a one and a half ton gear chain hoist? A. That is right.

Q. Do you know what a Black & Decker Portable Grinder is? A. Yes, sir.

Q. What would be the life expectancy of that machine?

A. Five years is the normal allowance.

Q. And would it be usable in that period of time? A. Yes, sir; in excess of that.

Q. And on hydraulic jacks, is there a life expectancy on those machines?

A. We have used them for twenty years.

Q. Then the normal life expectancy would be at least five years? A. Yes, sir.

Q. Mr. Joslin, who was Ralph Jung?

A. He was my boiler superintendent. [862]

Q. Was he authorized to represent you as agent, or bind you by any opinion, or commitment?

A. No, sir; he was not.

Q. Who was the one at the Sunflower project

(Testimony of William Edward Joslin.)

in Kansas City, Kansas, who was authorized to represent you, not only who they were, but also to what extent they were authorized to bind you in any manner?

A. Mr. Wedlick, during his stay, and Mr.—I think that was from January, 1944 until the middle of August, but I have forgotten the date. It was in 1944.

Q. It was around December?

A. Well, possibly so; and after that Mr. Carl Vasicek replaced Mr. Wedlick with full power of attorney. Those were the only two representatives appointed by me to represent and to sign in my behalf.

Q. Now then, as to the full power of attorney, Mr. Vasicek and Mr. Wedlick were under your direction, they were authorized with full power of attorney for what purposes?

A. So far as signing change orders, agreeing to prices, approving contracts, but not the payment of any checks.

Q. That was primarily with the A-E-M?

A. As my representatives to handle any emergency that might arise on that project, with the exception of signing checks.

Q. Was that a requirement of the A-E-M, on the project? [863]

A. A requirement of the contract was that either I myself had to be there, or some duly appointed representative with power to act in my behalf during the life of my contract.

(Testimony of William Edward Joslin.)

Q. And that applied to any other contractor directly or indirectly under the A.-E.-M.?

A. That applied to any contract, a fixed fee contract, or a lump sum contract.

Q. Were any of those names which have been brought in, or mentioned here,—in the interest of saving time, Mr. Joslin, I will ask you this: Were there any other names except Mr. Wedlick and Mr. Vasicek authorized, or appointed, as your representative, or authorized to represent you in any manner?

A. Nobody except Mr. Wedlick and Mr. Vasicek were authorized to represent me in any manner whatever, as to binding me in any way.

Mr. Gibson: I believe that is all.

The Court: There was something said about suspending this project at one time,—were you there at that time, Mr. Joslin?

A. You mean when you say “suspending this project,” Power House No. 1?

The Court: Any part of it? Were you engaged at a time when any part of its was suspended?

A. Various segments of the Hercules Power Plant at Sunflower [864] was suspended at various times. Some of them were suspended in my absence.

The Court: I don't think that your contract is in evidence. Did the Government reserve the right to suspend construction?

A. Yes, sir.

The Court: What would have been the result

(Testimony of William Edward Joslin.)

if they suspended the construction on this Power House No. 1?

A. They did suspend construction on Power House No. 1 at which time if we had made a previous estimate of the work involved a credit would be given for that amount of work done.

The Court: What, if they had determined after you entered into this contract with the plaintiff that they would suspend the construction,—what position would that place you in with the Power Service Corporation?

A. I would have had to pay them up to the time and the amount of work done at that time.

Mr. Gibson: I think there is a clause covering that, as to the minimum work done and the adjusted payment in the event of suspension.

The Court: If there was any material missing, was there any authority to suspend work because of that?

A. Yes; there was a clause in the contract that we can suspend the operation on this project at any time there was an insufficient amount of material available, or insufficient [865] manpower, or any reason that might happen due to the shortage of material. We had the authority to suspend operation on the project; yes, sir.

Mr. Gibson: Were you talking about the project, or the power house?

A. The power house.

The Court: I was thinking about this defendant's relation to the Power Service Corporation,—

(Testimony of William Edward Joslin.)

if the Government could suspend the work what position that would leave this defendant in with the Power Service Corporation, whether he could suspend work.

Mr. Gibson: I think that followed right along.

The Court: The question of his contract is not before the Court. If the Government could suspend work for ten days, could they suspend that work for that period and require you to go ahead?

A. We could suspend for ten days with the approval of the contracting officer.

The Court: Could they suspend without that approval?

A. Yes, sir; they had that authority.

The Court: I believe that is all.

Cross Examination

By Mr. Watts:

The Court: Before you start on your cross examination [866] we will recess for fifteen minutes.

March 31st, 1944, 11:15 a.m.

The Witness (Mr. Joslin): May I say, your Honor, I was under the impression in answering the question, I was considering what would be the procedure, how the Government ordered suspension of operations on power house No. 1. That is in the specifications repeatedly.

The Court: There is nothing in your original contract?

A. Yes; in my original contract.

Mr. Gibson: And that is bound into this contract?

(Testimony of William Edward Joslin.)

A. Yes.

Mr. Gibson: That is all.

Cross Examination

By Mr. Watts:

Q. Were you at the site of the Sunflower when Mr. Joslin came down to bid on this contract,—I mean when Mr. Borst came down to bid on the contract? A. No, sir; I was not.

Q. Were you there on July 11th, 12th or 13th when he commenced performance of this contract?

A. No; I was not.

Q. You were there some time in August, in the early [867] part of August? A. Yes, sir.

Q. Can you give approximately the dates when you were there?

A. I arrived there, to the best of my memory,—it was approximately August 8th. I was there up to,—well, I would say approximately the 25th of August, less the time I spent at Minneapolis.

Q. How long were you at Minneapolis?

A. I think it was three days.

Q. When were you next at the site?

A. I think it was in December.

Q. What date? Can you place it with reference to some other time, maybe?

A. I shook hands with Mr. Borst the date he left there.

Q. On December 19th?

A. I was there at that time.

Q. How long had you been there?

(Testimony of William Edward Joslin.)

A. I had been there at that time anywhere from one to two weeks.

Q. Between seven and fourteen days?

A. Approximately; yes, sir.

Q. When did Mr. Wedlick leave?

A. Without checking the records, I would not know. [868]

Q. Mr. Wedlick left before Mr. Borst did?

A. Yes; he left before Borst.

Q. Those were the only times that you were on this job?

A. I suppose that you mean during this contract?

Q. Yes.

A. That I would have to check.

Q. Those are the only times that you can recall, —I will put it that way?

A. At this time it is; yes. If Mr. Wedlick left at a different time then I was there when Mr. Wedlick left. I replaced Mr. Wedlick with Mr. Vasicek.

Q. Mr. Vasicek had been there all of the time?

A. Yes.

Q. Will you tell the Court whether you ever talked to Mr. Borst after he started to work, or from the time he started to work until the date that he left? A. No, sir; I didn't.

Q. Will you tell the Court how many times during the time that he was there from July 11th until December 19th that you went down to Power House No. 1 and made an inspection of the progress of this work?

(Testimony of William Edward Joslin.)

A. That was not my responsibility. I used to make field inspections around the entire area with the various superintendents at which times I received their diary and reports. [869]

Q. Did you, or did you not, go down to the site of Power House No. 1 during the time Mr. Borst was there performing this contract?

A. I went there, not as an inspection, not on that basis, and not on the basis of making any determination of the work. I visited the power house along with every other site on the project. We made no report on the power house.

Q. You didn't see Mr. Borst on this visit?

A. No, sir.

Q. The only time you talked to him was when you told him goodbye and at the time you were there to relieve Mr. Wedlick?

A. That is the only time I remember talking to him, when I told him goodbye.

Q. You had nothing to do with the preparation of the specifications on this contract did you?

A. I had nothing to do with the preparation of any contracts or any specifications that were supplied to me by the Government or the A.-E.-M.

Q. None of your employees had anything to do with the preparation of the specifications, did they?

A. None of my employees would have anything to do with this, or with any other, specifications supplied by the Government or the A.-E.-M.

Q. You yourself didn't call for the bids on this contract?

A. No, sir. [870]

(Testimony of William Edward Joslin.)

Q. Nor any of your employees or representatives? They did not call for bids on this contract, did they?

A. I don't know whether they personally called for them. The bids would have to be submitted to us as the contractor on this contract. Whether we mailed the requests for bids, I do not know.

Q. The question was: Did you call for any of the bids yourself? A. I personally did not.

Q. Nor any of your representatives?

A. I would not know whether it was our representatives that called for the bids, or not.

Q. Did you select the successful bidder on this contract, or was that by the contracting officer?

A. That was by the contracting officer at our recommendation, that the contract be awarded to the Power Service Corporation.

Q. Now, Mr. Joslin, did you have anything to do with the typing or the preparation of the formal contract that was subsequently entered into by yourself and the Power Service Corporation?

A. We had nothing to do with the typing of the contract.

Q. It was prepared in whose office? [871]

A. I would not know in whose office it was prepared. It probably was written up in Murphy's office.

Q. In fact, it was written up in his office and mailed out by him for signature?

A. Probably so.

Q. Did you yourself, or any representative of

(Testimony of William Edward Joslin.)

yours, have anything to do with the preparation of any of the three modifications, Modification No. 1, No. 2 or No. 3? A. Yes, sir.

Q. Did you prepare these modifications?

A. After the original was prepared by the Power Service Corporation.

Q. How was that?

A. The original of the modification was prepared by the Power Service Corporation.

Q. You mean this clause on the signature page of the contract?

A. No; I am speaking of the items that went to make up the modifications. That was originally submitted by the Power Service Corporation. It was recommended verbally by ourselves, and approved by the contracting officer, and later incorporated into a unit known as Modifications No. 1, No. 2 and No. 3.

Q. And later these proposed modifications, they were actually prepared by the A.-E.-M. engineering office? [872]

A. Those were, from the estimate submitted by the Power Service Corporation.

Q. I think you testified yesterday, Mr. Joslin, that when the matter of resuming operation on Power House No. 1 first came up in June of 1944 that you were very much opposed to anyone else handling that contract other than your own organization? A. That is correct.

Q. You tried to get the government to let you

(Testimony of William Edward Joslin.)

handle this contract before they called for bids; that is true?

A. That is not quite true. We were instructed to proceed with this contract prior to the Government or ourselves calling for bids. We were instructed to proceed with the completion of this contract, after which I was notified by long distance telephone that they desired to sublet it out, at which time I was opposed to subletting it.

Q. You were opposed to anyone performing this other than your own organization before the bids were called for?

A. Before the specifications were completed; yes.

Q. After the bids were accepted and after the performance started on the work you tried to get the Government to cancel this contract and let you complete this work?

A. That is true.

Q. On August 12th, which was within a month after the [873] award was made, you wrote a letter to the Project Manager, Mr. Duekelow, when they requested that clause be inserted to protect them against delay, you urged at that time,—I will just read it here, this last paragraph: "We appreciate their position, but are opposed to incorporating their dictated paragraph on the signed sheet of their contract."

A. That is correct.

Q. What did you mean when you said, "We appreciate their position?"

A. I meant that it was possible that the time would be extended, which we had no objection to, but their proposal as dictated did not request time extension only.

(Testimony of William Edward Joslin.)

Q. On the same date you knew that claims for damages would subsequently be presented by the Power Service Corporation if the contract was to be carried forward by them?

A. No, sir; I did not know that claims would subsequently be presented. I did know on checking through my files, and the files of this contract, which it was one of my duties to check back through the work and the progress of the work,—both our own work and this work, which was under our direction, at which time I discovered the application from the Power Service Corporation stating that they had an estimated cost of approximately \$41,000.00.

Q. For how many days delay? [874]

A. I would not know the number of days, but I remember the approximate amount of money.

Q. Suppose you look at the letter of August 3rd, which is Exhibit No. 7?

A. Yes, sir; I have it here. It reads: "The following analysis of time extension is as presented verbally to yourself and the Area Engineer today.

"Basis of Time Extension. Boiler No. 1,—

Q. (Interposing:) That is dated August 3rd, and is addressed to Cory, Joslin & Macnsons, and signed by W. L. Borst, Chief Engineer.

A. Yes, sir; that is right.

Q. Now, go ahead.

A. "Basis of Time Extension. Boiler No. 1, water-wall tubes required August 1st, 1944, water-wall tubes scheduled delivery, August 22nd, delay three weeks.

(Testimony of William Edward Joslin.)

“Boiler No. 2. Water-wall tubes required August 8th, 1944. Water-wall tubes scheduled delivery September 29th. Delay seven weeks.

“Boiler No. 3. Water-wall tubes required August 15th. Water-wall tubes scheduled delivery September 29th. Delay six weeks.

“Hypothesis for estimate of cost for six weeks delay in completion,— [875]

Q. (Interposing:) In other words, on August 3rd upon receipt of that letter you knew from that time forward, and you anticipated that there would be a delay of forty-two days, and, second, you knew that there would be submitted a claim for damages?

A. No, sir; I did not know on August third. In fact, I knew by August 12th of that letter. I knew on August 12th, in which I in no way agreed that it was correct. That was my reason for not believing it to be correct, and that was my sole reason for writing and suggesting that the Government cancel that contract.

Q. Now, reading from Exhibit No. 10-A, which is dated August 12th: “Gentlemen:”—and this is for Mr. A. A. Dukelow: “We note in our files the request of the Power Service Corporation for additional fee in the amount of \$41,382.00 claim for delays because of material shortages. It is the belief of the writer that material shortages will develop throughout the life of the Power Service Corporation’s contract, and these shortages will remain a constant source of controversy of claims filed by the Power Service Corporation.

(Testimony of William Edward Joslin.)

“We believe that it would be to the benefit of the Government and all parties concerned if legal steps were taken to compensate the Power Service Corporation for costs expended, together with a reasonable profit allowable by the Government, and cancel their contract, and complete Power House No. 1 with our [876] own forces. By so doing we will avoid possible future claims and litigation that might develop should this contract remain in force.”

A. That is my letter and expresses my opinion exactly as of that date.

Q. Four days later than August 12th, to-wit: On August 16th, 1944, you had lunch with Mr. Fegles in Minneapolis?

A. About that time. I don't remember the date.

Q. Did you on that date discuss a possible change in the form of the contract with Mr. Fegles?

A. I discussed the matter with Mr. Fegles. When I was introduced to him at the Twin City Ordnance Plant by Colonel Taylor, he said, “I want you to meet the contractor for whom you are sub-contracting at Sunflower.” Mr. Fegles said, “I would like to amend that contract,—

Q. (Interposing:) Is that all of the conversation?

A. I said, “So far as I am concerned, I am sorry, but the contract will have to stand as written.”

Q. Did you tell Mr. Fegles that you agreed with him on August 16th that the position of the Power Service Corporation should be made clear before the contract was signed?

(Testimony of William Edward Joslin.)

A. I don't remember any such statement as that.

Q. Did you discuss with him at that time about the possibility of writing for a construction from the A.-E.-M., or the Government, of paragraph 1-05 (e) of the specifications? [877]

A. I remember no further discussion about this contract with Mr. Fegles, other than the original statement.

Q. Let me ask you if this letter of August 22nd, which is Exhibit No. 16, is not in fact a direct outgrowth of this conversation that you had with Mr. Fegles on August 16th, the letter being dated August 22nd?

A. No. I believe this letter is an outgrowth of one previously written, to which we refused to approve, and not a direct result of the conversation with Mr. Fegles.

Q. Then by that you mean that Exhibit No. 9,—please refer to exhibit No. 9.

A. Yes; I have it.

Q. In other words, under exhibit No. 9, which is Plaintiff's letter to you dated August 8th, 1944, they had requested that the clause be appended to the signature page, and you had replied that you were opposed to that clause. Now that is the reason why the letter of August 22nd was written asking for a construction by the A.-E.-M., and by you and the contracting officer, of clause 1-05 (e) of the specifications?

A. I say, it is my opinion that this second letter of August 22nd, Exhibit No. 16, I believe, and it

(Testimony of William Edward Joslin.)

is my opinion, that this letter is the result of the refusal to accept exhibit No. 9, and not a direct result of a conversation with Mr. Fegles. [878]

Q. Now, may I have your Exhibit "M"?

A. Yes.

Q. After this letter of August 22nd, in which they ask for a construction, or for an interpretation, of the contract, then a letter was written you by Mr. Wedlick, and later a letter written to Mr. Wedlick refusing to give construction of the contract, but you gave some personal instructions to Mr. Wedlick about making any change in the contract?

A. I don't know the date that I gave Mr. Wedlick the instructions, but I do remember the instructions.

Q. I hand you Exhibit "M", which is dated August 26th?

A. That is correct. Mr. Wedlick, I believe, sent me a photostatic copy, or a made copy, to which I replied.

Q. And in that letter you wrote as follows,—I am reading the second paragraph: "I am not familiar with the legal phases involved, but I am sure that we must insist that the terms of the contract be met, and any consideration for additional costs and extension of time must be submitted direct to others than ourselves for approval. This, of course, will be separate and not a part of the contract which must be signed as is." That is signed by yourself, Mr. Joslin?

A. Yes, sir.

(Testimony of William Edward Joslin.)

Q. Now, what do you mean in that letter when you say, "It must be submitted direct to others than ourselves for approval?" [879]

A. We would not have authority to approve any appendages to the contract proper, unless,—

Q. (Interposing:) Unless what?

A. We would have no authority to approve any appendage to the contract. We would submit any proposition presented by the Power Service Corporation up to the contracting officer through the A.-E.-M., for a final decision, and the contracting officer, on behalf of the Government, would direct us to follow any procedure, and we would, according to the general terms of our contract, comply with the directive issued by the contracting officer.

Q. Wasn't this idea of a special clause, in fact, taken up with the A.-E.-M., and the contracting officer?

A. I don't know. I was not there at that time.

Q. You were not there when any of these negotiations were carried on, were you?

A. I was there during the negotiations of the first clause submitted. I think it was Exhibit No. 9. When that was transmitted, I was there at that time, but I was not there on the 22nd of August. I was not there during the time following the negotiations.

Q. You had no objections to a change in the original form of the contract, if the contracting officer and the A.-E.-M., first approved it?

A. Yes; I did. In fact, I stated to Mr. Hagan

(Testimony of William Edward Joslin.)

in his office [880] at Sunflower, prior to my leaving, that we would not be a party to anything that altered the language of that contract in any shape or form. I was very explicit, so Mr. Hagan understood what I meant.

Q. When did you first learn that a special clause had been appended to the contract? Before it was executed?

A. When Mr. Wedlick phoned me that the final clause which was finally added to the signature page of the contract,—he phoned me about it, and I asked if it in any way changed the language of the contract, and he advised me that he had taken it up with Mr. Dergance and Mr. Dergance stated that it only reiterated the rights granted the Power Service Corporation under the contract, and in no way changed the contract.

Q. Did you make any further investigation of your rights and liabilities under that special clause before November 10th?

A. I don't remember the date. The only reference I had about it later was during the visit to the Sunflower Ordnance Plant I remember I again questioned Mr. Dergance as to this clause.

Q. When did you question Mr. Dergance? Was that in December?

A. It was during my next trip. I don't remember the date.

Q. I believe you stated that it was in December?

A. Yes; I think so.

Q. That was at the time the plaintiff had completed its contract?

(Testimony of William Edward Joslin.)

A. So far as I know, that is correct.

Q. At any time from the time this contract was executed by your project manager, Mr. Wedlick, up until the present time, have you ever protested to the plaintiff that this signature was not authorized to the contract? A. Not to my knowledge.

Q. Have you ever made any protest to the plaintiff about the inclusion of this special clause to the contract before it was signed?

A. Not to my knowledge.

Q. Now, what requirement, if any, did you impose upon a bidder with respect to making an inventory of the materials at the site before bids were submitted? A. I made no requirement.

Q. Was there any requirement made by the specifications, for example, about a complete inventory be made before a bid was submitted?

A. The specifications were written so as to permit an inventory being made, but I would not in any way state that an inventory was necessary to properly prepare a bid on this contract. [882]

Q. As a matter of fact, it was not necessary to make a complete inventory before the bid was submitted?

A. To me it was not necessary. It was possible, but it was not necessary to make an inventory of all of that material in order to properly prepare a bid on that contract.

Q. But it was necessary, according to the contract itself, as soon as the award was made on the bid for the successful bidder to do two things; first,

(Testimony of William Edward Joslin.)

to make up a material list, and subsequently make up a field inventory and check that against the material list?

A. Well, I think the term is expressed,—I think the real intent of the contract is expressed in it, and that was done so that a complete material list should be made from the plans, and then checked against a physical inventory at the site, because that is the only way you could coordinate the two.

Q. What is the meaning of that part of Section 5-04 (b) of the specifications which reads: "Such an inventory will be kept current by the subcontractor during the progress of the work, and the subcontractor will be held responsible for advising the constructor of his requirements sufficiently in advance of the time such items will be required to enable procurement without delaying progress?"

A. It means just what it says.

Q. It means that the field inventory will be checked [883] against the material list during the performance of the contract so as to ascertain at all times the shortages in time for them to be requisitioned to meet the construction schedule?

A. Not necessarily.

Q. What does it mean?

A. Well, it could mean, and very probably did mean, to keep them current at all times, and the meaning is that they would add to that inventory any material that would have been delivered to them from a requisition previously issued, and to keep the inventory current at all times.

(Testimony of William Edward Joslin.)

Q. You have full access to your records in connection with this contract?

A. Yes; I have access to them, but please don't ask me to find them.

Q. Do you have a single instance recorded in your correspondence where you made any complaint against Mr. Borst or his company about the manner in which he prepared the material lists, or the field inventory?

A. Yes; we have. I think we have a letter of transmittal, or a copy of a letter, received from Mr. Hagan, and I think it was transmitted through our office, complaining about the inventory.

Q. Did you or any representative of your company ever [886] make any complaint to the Power Service Corporation about their failure to make the inventory on time?

A. Not to my knowledge, and as a personal matter I didn't.

Q. You didn't know of any of your employees making such a complaint?

A. The only reference I have of a complaint is on a labor report in our files which said that Mr. Borst promised to try and secure more men. That is a notation by one of our foremen. That is the only complaint I know of.

Q. You haven't introduced that record?

A. No, I don't know whether it is signed. It is a carbon copy, and in pencil. I have it in my brief case.

Q. After the plaintiff started the performance

(Testimony of William Edward Joslin.)

of that contract you expected them to complete in the one hundred and twenty days? A. I did.

Q. And you expected to deliver to them the materials at times and in quantities required sufficient to enable them to commence their work according to their schedule, and to finish it according to their schedule? A. Not necessarily.

Q. You reserved to yourself the right to furnish materials to them whenever you wished to do so, regardless of the time [887] provided for in their schedules?

A. No; it was our intention, and I believe we did furnish them materials at the earliest possible time after being notified by the Power Service Corporation that any such materials would be needed, regardless of the date of starting, or the progress schedule.

Q. I asked if you had access to your own records, and you said that you did. Now, I will ask you, Mr. Joslin, if you have ever requested, or asked, the Hercules or the Combustion people for any of their records in connection with this trial?

A. No; we never made application to them for any of their records.

Q. What is the difference between boiler tubes and water-wall tubes?

A. Water-wall tubes are the tubes that go around the outside of the boiler on the furnace side of the brickwork. They are used for heat retention. The fins are on there to secure additional heating surface. The boiler tubes are installed inside of the boiler.

(Testimony of William Edward Joslin.)

Q. The thing we are concerned with here is the two hundred and twenty-four boiler tubes?

A. That is right.

Q. You didn't know that these were missing when the specifications were turned over to the Power Service Corporation [888] to bid upon?

A. I don't know that I made such a statement, but I didn't know that they were or were not.

Q. And the same thing is true at the time that the bid was accepted,—you didn't know they were or were not there?

A. I didn't know of the presence or the absence of any particular material.

Q. You do know that Mr. Wedlick learned that these two hundred and twenty-four tubes were missing on July 14th? A. No; I didn't learn that.

Q. Did you learn that Mr. Wedlick knew that the water-wall tubes were missing on July 14th?

A. I don't know that Mr. Wedlick learned that these tubes, or any tubes, other than the general information that there were some missing tubes, which information, I presume, was submitted to him on July 14th. I don't know about that.

Q. Had you learned that Mr. Wedlick knew those were missing on July 26th, the date of the plaintiff's letter, which is Plaintiff's Exhibit No. 4?

A. I believe,—may I look at that Exhibit No. 4,—I believe that Mr. Wedlick was informed that the water-wall tubes for all three of the boilers were missing on July 26th.

Q. And if all of the water-wall tubes were miss-

(Testimony of William Edward Joslin.)

ing [889] for all three of the boilers that would mean two hundred and twenty-four tubes?

A. That would mean seven hundred and fourteen tubes.

Q. Now, each one of these water-wall tubes that were missing has a particular and different designation and description?

A. That is correct.

Q. On this letter of August 19th, 1944, you were given confirmation of the list of those that were missing?

A. Those were represented at that time to be,—

Q. (Interposing): I believe that is Exhibit No. 20.

A. It is represented as furnace tubes and not as water-wall tubes. I am not saying that those particular tubes were not water-wall tubes, but I say that the requisition specified them as furnace tubes, which we assumed to be correct.

Q. Now then, Mr. Joslin, when you received this notation when Mr. Wedlick learned that these water-wall tubes were missing, did you or he take any steps to requisition them from the manufacturer?

Mr. Gibson: I think that question implies something that is not in the record. He says in this question, "When these water-wall tubes were missing," or "when you learned that the water-wall tubes were missing," and it simply says in this letter, or notification, "tubes." [980]

The Court: There isn't any question but what

(Testimony of William Edward Joslin.)

the tubes were missing. I don't remember whether there was any connection with Mr. Wedlick on this matter or not. I think he may answer.

A. I don't know whether Mr. Wedlick contacted the Hercules or the Combustion people about the water-wall tubes.

Q. The simple question I want you to answer, Mr. Joslin, is: Did you, or did you not, requisition these tubes on or about July 14th when you learned that they were missing?

A. We didn't requisition any material from the Hercules until such time as we received a request to do so by the Power Service Corporation.

Q. Did you on July 26th requisition these from the Hercules people?

A. We didn't until we received a requisition from the Power Service Corporation.

Q. Did you requisition them on July 19th,—August 19th, I mean? A. No, sir.

The Court: We will recess at this time, and I think we will convene at one thirty, if you gentlemen will meet me at one thirty.

March 31st, 1947, 1:30 p.m. [891]

Q. (Mr. Watts, continuing): At the recess, Mr. Joslin, we were inquiring about the requisition on the two hundred twenty-four water-wall tubes found to be missing. You did not issue any requisition yourself when you received the plaintiff's letter of July 26th, 1944, did you?

A. It was not our place to issue requisitions. It was the Power Service Corporation who issued the

(Testimony of William Edward Joslin.)

requisition. The procedure was this: When the Power Service Corporation would issue a requisition, they would specify what material they wanted, and we took it direct to Hercules and see if that material was on purchase, or if it was delivered, and if it was delivered we would ascertain where it was stored, and we would collect it and bring it to Power House No. 1. It was not our purpose to issue requisitions except for what was ordered by Hercules.

Q. The point is, Mr. Joslin, that you never issued a single requisition for a single water-wall tube? A. No, sir.

Q. Do you have in your possession the records of Hercules Company showing when they requisitioned any of those tubes? A. No, sir.

Q. Have you asked for them?

A. I would not have any of the Hercules Company's records.

Q. Have you asked for them? [892]

A. No; I haven't asked for the Hercules records.

Q. Isn't it true that these two hundred and twenty-four water-wall tubes had been requisitioned by the Hercules people from the Combustion Engineering Company prior to July 10th, 1944?

A. I would not know.

Q. Isn't it a fact that Mr. Clay of the Hercules Powder Company was in Washington, D. C., around July 10th, 1944, in an effort to expedite the manufacture and delivery of these water-wall tubes?

A. I would not know.

(Testimony of William Edward Joslin.)

Q. The fact is that you and your organization as such did nothing to expedite the delivery of this material at any time, but that you left the expediting of these water-wall tubes to the Hercules Company, who was charged with furnishing them?

A. No, sir; it was our responsibility to press the Hercules Powder Company for delivery of any materials they may have had on order; if the Hercules failed to expedite them sufficiently, we went then and attempted to acquire, or secure, Government assistance.

Q. Have you any records here showing what you did to expedite the material after July 14th?

A. That would be personal contacts. [893]

Q. By whom?

A. By Mr. Jung, Mr. Wedlick or Mr. Vasicek.

Q. Mr. Wedlick's deposition was taken in this case?

A. I believe it was.

Q. But no questions were asked by you as to what was done after July 14th as to expediting this material?

A. I didn't make out the interrogatories, but I imagine the deposition itself would be the best evidence.

Q. Do you know of anything that Mr. Wedlick did to expedite this material after July 14th?

A. I knew his instructions. I wasn't there, and I would not know what he did or did not do.

Q. Do you know what he did after August 19th?

A. I would not know, particularly, what he did, but I knew what his duties were.

(Testimony of William Edward Joslin.)

Q. It is a fact that these water-wall tubes had been on order by the Hercules Company from the Combustion Engineering Company prior to the time the contract was awarded to the plaintiff?

A. As I understand it, all of the boiler drums, tubes and headers were on order with the Combustion Engineering Company, placed there by the Hercules Powder Company. I do not believe that the Hercules people knew what tubes were missing any more than we did. It was only by an inventory and check by the Combustion Engineering Company, more so [984] than the Power Service Corporation, that it ever developed what tubes were missing.

Q. You don't mean to convey to the Court the opinion here that these tubes were ordered, manufactured and delivered after our requisition notice of August 19th?

A. I don't know just when the last tubes were delivered. I do know the approximate date that the Combustion Engineering Company notified the Power Service Corporation of some materials.

Q. Isn't it a fact that the Combustion Engineering Company notified the Power Service Corporation that they were going to be six weeks late? And that was known to Mr. Borst at the time he wrote you the letter of August 3rd estimating a six weeks delay?

A. The only thing I know is a copy of Mr. Borst's letter to us, that Mr. Bennett of the Combustion Engineering Company had advised him of

(Testimony of William Edward Joslin.)

the shortage of tubes, and that was not developed by the Power Service Corporation, but the Combustion Engineering Company's Mr. Bennett. It was something that Mr. Bennett developed on his own behalf, and for the Power Service Corporation.

Q. That was developed, however, prior to August 23rd?

A. The notice I got was on August 19th.

Q. Are you intending to convey the idea to the Court that these tubes were not being manufactured as early as July 10th, [895] 1944?

A. I am not trying to convey anything to the Court. I am trying to answer your questions, Mr. Watts.

Q. What I am getting at is this: The tubes,—the water-wall tubes had already been ordered by the Hercules Powder Company from the Combustion Engineering Company prior to the time this contract was let; isn't that true?

A. It is, assuming the Hercules people placed the order for the entire boiler at one time, which was prior to this contract.

Q. Which would, of course, include the individual number of each one of these tubes, wouldn't it?

A. Which would include each and every tube, and each and every header, but no assurance that they would be there on the site at the time the contract was let.

Q. And that was what Mr. Clay was doing in Washington, expediting these water-wall tubes?

A. If you want my opinion on that, he would

(Testimony of William Edward Joslin.)

not know what a water-wall tube was, let alone expediting them.

Q. But his duty was to expedite the water-wall tubes?

A. His duty was as expediter for the Hercules Powder Company.

Q. You don't have any knowledge of the time when these water-wall tubes were requisitioned from the Combustion [896] Engineering Company by the Hercules Powder Company? A. No.

Q. Do you know of anything that was done by the Hercules or the Combustion Engineering Company with respect to these water-wall tubes after our letter of August 19th to you?

A. Only from general information that they were working on them.

Q. They had been working on them for some months?

A. I don't believe so, because of the fact that the power house was ordered in stand-by condition, and I don't think the Combustion Engineering would continue to manufacture a boiler for a power house in stand-by condition.

Q. Isn't it a fact when resume-work order was given it was known by Mr. Clay and Mr. Neubauer of the Hercules people that these tubes were missing, and that they were put to work immediately to get these tubes there on the site so they would be available for installation when the contract was let?

A. I don't think that is a fact. Mr. Neubauer

(Testimony of William Edward Joslin.)

was not on the site when this resume-work order was given.

Q. Are you in a position, Mr. Joslin, to give the Court any copies of requisitions, or letters, that will show when Hercules Powder Company ordered these tubes from the Combustion Engineering Company?

A. I am not in a position to do that. [897]

Q. Did you ask Hercules or Combustion Engineering Company for them? A. No.

Q. You have no records of your own showing when they were ordered?

A. No; I haven't. I might add that if we had asked for those I would not have gotten them. That was secret information.

Mr. Watts: I think possibly the Court will take judicial notice of the fact that neither of us could get that information.

Q. (Mr. Watts, continuing:) Coming down to the matter of the progress schedule, I believe that you stated that one of the purposes of a progress schedule was to enable the Power Service Corporation to draw down a percentage of its total contract from time to time; that is true, is it not, Mr. Joslin?

A. You mean by application for payment?

Q. Yes. A. Yes, sir; that is true.

Q. Another purpose was to designate the time when the Power Service Corporation should commence on one type, or one segment, of work, and when it should have that work ended? [898]

(Testimony of William Edward Joslin.)

A. Not necessarily.

Q. Well, Mr. Joslin, there is a certain provision of the contract that made time of the essence of the contract? A. Yes, sir.

Q. And that meant that the job as a whole had to be completed within one hundred and twenty days? A. That is right.

Q. But you say it was not the purpose of the schedule to determine when they should start and when they should end any operation on this project, or any portion of the work?

A. Not necessarily.

Q. Also, another purpose was to enable you, the A-E-M, and the Hercules people and any others who were responsible for furnishing material, to know when certain materials were needed?

A. Definitely not.

Q. Well, now let us take, for example, Exhibit No. 64, the steam generating unit, the schedule, that is, the construction schedules show that the plaintiff was to commence work on boiler No. 1 on what date?

A. Segment No. 3, boiler No. 1?

Q. That is right.

A. They proposed to start on July 19th.

Q. And at the same time you proposed to have available [899] for them on that date the drums, tubes and water-wall headers, did you not?

A. No.

Q. You did not?

A. You mean all of them?

(Testimony of William Edward Joslin.)

Q. Well, enough for them to start.

A. Yes, sir. Not necessarily the headers and the drums—not necessarily the headers or the tubes, but we were supposed to have material for them to start on the work.

Q. And you were supposed to have material there to enable them to complete that work by November 10th?

A. To complete by November 10th.

Q. And the same is true of all of the other equipment, that you were obligated under your contract to furnish, that is, the equipment and the materials which you were to furnish, that is—it was to be furnished in time for them to have a reasonable time thereafter to complete their contract according to the schedule?

A. If the material was available; yes; to get the material there as quickly as possible, with the full intention of their completing prior to November 15th, with the modifications, and prior to November 10th, before the modifications, but we were not obligated to furnish them material so that it was certain that they would be complete by that time. Neither the contracting [900] or ourselves knew what might happen in the installation of that boiler, so that it might not be completed by November 10th. By that I mean, we were not in a position to know that something would not happen to make it impossible to complete it by November 10th.

Q. And you contemplated when the contract was

(Testimony of William Edward Joslin.)

entered into that you might not be able to deliver this material for the contractor to install it according to the schedules? A. That is correct.

Q. That is one of the things that you took into consideration when you executed this special clause on the signature page?

A. No, sir; I didn't take into consideration anything. I was not responsible for that.

Q. So your testimony is that the purpose of this progress schedule was not to designate the dates upon which you were required—reasonably required to furnish materials for installation?

A. This schedule is presented for the purpose of establishing a date when the Power Service Corporation proposed to start operation on a particular portion of this job. It does not necessarily mean that they have to start on that particular date; neither does it mean that we have the material on hand on that date. It represents a date that they propose to start and also a date that they propose to finish. It does not mean that we have to [901] have the material, as I said, immediately on the date, nor does it mean that they have to start, nor have to complete, on the date designated, or shown on the proposed schedule in order to complete within the one hundred and twenty days. For example, under the item "main and auxiliary high pressure units," there was no shortage of material there, and they proposed on that chart to start on July 13th and they actually started on August 8th.

(Testimony of William Edward Joslin.)

Q. Well now, Mr. Joslin, the question I am asking is this: Does the schedule reasonably apprise you of the time when the materials were required to be there?

A. The schedule informs me of the date that they propose to start that segment of work. The material is assumed to be there until such time as we receive a requisition advising us that the material is not there.

Q. But you say some of the materials were not there?

A. It is assumed that the material is there until such time as we are advised by requisition that the material is not there.

Q. You were advised as early as July 13th that the material was not there?

A. That is correct, but that information was of no value to us.

Q. Did you do anything on July 14th to expedite the [902] missing material so it might be present when they would call for it?

A. I don't know that we were aware that the material was present or absent on that date.

Q. But you were aware of that fact on August 19th?

A. That is correct.

Q. And what did you do after August 19th?

A. We would follow the very normal procedure and advise the Hercules people of the information we had for the Power Service Corporation—

Q. (Interposing:) Mr. Joslin, have you any record of what you did after August 19th?

(Testimony of William Edward Joslin.)

A. Nothing that we did in relation to any requisition. Such record was not necessary to be kept.

Q. Were the times that it was specified in this progress schedule on which the work should be commenced, was it reasonable in every respect so far as the time allowed for the completion of the contract in one hundred and twenty days?

A. I say that the one hundred and twenty day period was a reasonable time to complete this contract.

Q. Did you make any objection to any part of the progress schedule after it was approved by the contracting officer on August 22nd?

A. After it was approved by the contracting officer, we [903] received a copy—an approved copy. What transpired prior to that I do not know.

Q. Did you make any oral or any written complaint to the plaintiff about the reasonableness of the progress schedule?

A. No; we believe it was reasonable.

Q. You believe each of the parts, or segments, specified in the progress schedule was reasonable?

A. We believed that each segment could be completed within the one hundred and twenty days, which time we believe was reasonable.

Q. Where does Mr. Hagan live?

A. I think in Emporia, Kansas.

Q. And where does Mr. Jung live?

A. Emporia.

Q. Mr. Vasicek, where does he live?

A. Denver.

(Testimony of William Edward Joslin.)

Q. Did you make any attempt to take the depositions of these men? A. No, sir.

Q. Do you have in your files Mr. Jung's report in connection with the performance of this contract?

A. I have the labor reports that I found in the files. I don't think Mr. Jung prepared them.

Q. Have you any reports made by Mr. Jung—he was in your employ? [904]

A. Yes; he was.

Q. Have you any of his reports?

A. I would not know.

Q. Wasn't a copy of all of his reports collected to be used in connection with this trial?

A. The only thing we looked up was the correspondence that you had in your stipulation of facts that we tried to secure copies of.

Q. I am now reading Article Three on page 8-B of the contract: "If the subconstructor refuses, or fails, to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article One, or any extension thereof, or fails to complete said work within such time, the constructor may, with written notice to the subconstructor, terminate its right to proceed with the work, or such part of the work, as to which there has been delay. In such event, the constructor may take over the work, prosecute the same to completion by contract, or otherwise, and the subconstructor and its sureties shall be liable to the constructor for

(Testimony of William Edward Joslin.)

any excess cost occasioned the constructor thereby. If the subconstructor's right to proceed is so terminated, the constructor may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. Provided, that the right of the subconstructor [905] to proceed shall not be terminated under this Article, because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the subconstructor, including, but not restricted to Acts of God, or of the public enemy, acts of the constructor, acts of the Government, including, but not restricted to any preference, priority or allocation order, acts of other contractors or subcontractors in the performance of contracts or subcontracts with the Government or the constructor, fires, floods, epidemics, quarantines, restrictions, strikes, freight embargoes, and unusually severe weather or delays of the subconstructor's subcontractors due to such causes." Did you ever serve any notice of any kind on the Power Service Corporation—

Mr. Gibson: Just read the rest of that now, Mr. Watts.

Mr. Watts: Very well. "In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the

(Testimony of William Edward Joslin.)

parties hereto, subject only to appeal within thirty days by the contractor to the Secretary of War, or his duly authorized representative, whose decision on such appeal as to the facts of [906] delay and the extension of time for completing the work shall be final and conclusive on the parties hereto."

Q. (Mr. Watts, continuing:) Did you ever serve any written notice on this plaintiff, or representative of the plaintiff, in respect to any delays in accordance with this contract?

A. No, I didn't. I had no authority to do so under the terms of my contract.

Q. You didn't serve any such notice?

A. No, sir; that is correct.

Q. Now, I have turned to paragraph 1-10 of the specifications, and I will read that: "The sub-constructor shall within seven days after receipt of the Notice to Proceed, prepare and submit to the constructor for approval a practicable and feasible schedule showing the order in which the subconstructor proposes to carry on the work, the dates on which he will start the several salient features including procurement of plant and equipment, and the contemplated dates for completing the same. The schedule shall be in the form of a progress chart of suitable scale so as to indicate appropriately the percentage of work scheduled for completion at any time. The subconstructor shall enter the actual progress at the end of each week, and shall immediately deliver to the con-

(Testimony of William Edward Joslin.)

structor three blue-print copies of the same.” Did you ever make any complaint to the plaintiff [907] in writing or otherwise about their failure to furnish progress charts in this case?

A. No, sir.

Q. Do you know of any representative of yours that did this? A. I do not.

Q. And—

The Court: Isn’t it in the record that there was no complaint about how this project was constructed and handled, that there was no complaint about his work, or his failure to go ahead in any manner?

A. I have tried to convey that information; yes.

The Court: I think it is very clear, and no doubt it is clear in the record, because it is clear to the Court that the work was satisfactory in every way, that there was no complaint made, nor was there any foundation for any complaint.

Mr. Watts: All right. I will pass that up.

Q. (Mr. Watts, continuing:) When was the first time that any complaint was made by you that the plaintiff delayed—delayed in the performance of its contract—I will withdraw that, please. I will put the question this way: Are you familiar with the answer filed by your counsel in this case?

A. I don’t know whether I am or not.

Q. Do you know whether they ever made any complaint in [908] the answer in this case?

A. I don’t know.

(Testimony of William Edward Joslin.)

Q. Complaint that the plaintiff delayed in the performance of this contract?

A. I don't know.

Q. You were present at the taking of the four depositions in Minneapolis, and were also present at the taking of two more depositions in Kansas City in connection with the trial of this case?

A. That is correct.

Q. Did you or your attorneys ask of any one of these six witnesses one single question about delay, or alleged delay, in the performance by the plaintiff of the contract?

A. I would not know without reviewing the testimony.

Q. Do you recall any question asked about the matter of delay? A. I don't recall of any.

Q. Now, Mr. Joslin, you prepared a number of exhibits which are schedules, or copies of schedules, commencing with Exhibit "P" and going through and including Exhibit "W", in which you show, or attempt to show where the plaintiff was in default in the performance of this contract?

A. That is correct.

Q. I hand you Plaintiff's Exhibit No. 71, and ask you [909] what is an "S" curve on the progress chart?

(Whereupon document referred to was marked Plaintiff's Exhibit No. 71, for purposes of identification.)

A. It is a curve that shows the proposed pro-

(Testimony of William Edward Joslin.)

gress allowing for intersection points to state the percentage completed on any given date.

Q. It is true, is it not, that you can refer to this "S" curve on a chart and show, or rather, determine the rate of percentage performance per day any day during the performance of the contract?

A. Yes, sir; that is right.

Q. The "S" curve shows at the beginning of the performance a very low percentage per day of performance?

A. It shows a lower percentage of performance at the starting of the contract.

Q. And at the conclusion it shows a much lower percentage of performance than it does in the middle of the contract?

A. This particular curve, as do most curves.

Q. Now then, the solid line that runs across plaintiff's exhibit No. 64 is known as the "S" curve?

A. That is correct.

Q. When you prepared these schedules for the benefit of the Court did you follow the percentage rate of performance per day as shown by that curve at any point, or did you, as we say in engineering parlance, follow a straight line curve?

A. I didn't follow a straight line, neither did I project the "S" curve over the entire project. I have each item by itself.

Q. Each item by itself is in turn covered by the "S" curve?

A. That is correct. I make an "S" curve duplicate—

(Testimony of William Edward Joslin.)

Mr. Gibson: An "S" curve you say, Mr. Joslin?

A. An "S" curve.

Q. (Mr. Watts, continuing:) Didn't you take the total number of days shown on the "S" curve, that is, as shown to perform this work, the total number of days — and make an average of the whole thing?

A. I made an average on each item.

Q. There is an "S" curve of performance on each segment of the chart?

A. That is correct.

Q. Now, Mr. Joslin, let's take boiler No. 2 as an example: The total time allowed to perform the work on boiler No. 2 was July 20th to November 4th, a total of one hundred seven days?

A. On the over-all, that is correct.

Q. This curve shows seventy-one days were allowed in which to do eighty-eight per cent of the work?

A. This cross-hatch, the over-all percentage shows [911] seventy-one days, eighty-eight per cent in seventy-one days.

Q. It also gave the contractor thirty-six days to perform twelve per cent of the work. Now, the reason for the thirty-six days is because they retain a very little work to do on the last part of the curve?

A. You take the individual curves, Mr. Watts, and you will see that the latter part of the work they proposed to do faster, and the longer part, or period, they retain that for themselves.

(Testimony of William Edward Joslin.)

Q. Let us take boiler No. 3: The progress schedule allows from July 20th to November 10th, or one hundred thirteen days?

A. That is correct.

Q. The progress schedule also allowed us eighty-two days in which to do ninety per cent of the work? A. Yes, sir.

Q. And it also allows thirty-one days in which to do the last ten per cent?

A. You proposed ninety per cent of the work in eighty-two days, then they keep thirty-one days to pick up the ten per cent. You don't have to do that, because you take the individual charts and they don't show that. Your individual charts are correct, finally. They show a greater part of the work toward the end than the first of the job. You have carried that cross-hatch portion now to bring your completion date to November 10th, [912] and it is not a true picture of what you propose to do. The individual items are not taking the dates of July 20th to November 10th. You show that you will do all of this work between certain dates, and you propose by your schedule to do the last twenty per cent faster than the first twenty per cent, and it holds true on all of the charts. It is a true picture of what you proposed to do.

Q. Let us take the over-all chart: On October 27th our chart shows that we should have been ninety-five per cent completed at that time?

(Testimony of William Edward Joslin.)

A. Yes, sir. In October you proposed to be ninety-five per cent complete.

Q. That means that to do the last five per cent we had fourteen days in which to perform that work?

A. It shows that you had fourteen days; if the cross-hatch were extended.

Q. But, Mr. Joslin, the schedule allows fourteen additional days from October 27th in which to complete the five per cent. The point I want to make is that each item of the contract, or of the schedules, allows much more time to finish the last five or ten per cent than the remainder of the job?

A. But you would still have the same amount of work to do if you had the full curve. Now, that will be developed from these charts—

Q. (Interposing:) The average time, for example, on the [913] basis that you compute, will you give me the percentage on this exhibit No. 71 of the over-all contract that was to be performed each day?

A. I would have to develop the "S" curve.

Q. Please give me the result by using the average, as you did on these other charts?

A. I cannot do it here.

Q. All you have to do is divide one hundred twenty into one hundred per cent.

A. You have to take each item, the value of each item as shown, and that transposes all of these figures.

(Testimony of William Edward Joslin.)

Q. In that example, you took the average from the beginning to the end of the contract?

A. That is right, and the individual items, they are developed on the "S" curve applied to each individual item, and then you show the step on your curve, and when you take the total of the items you show a particular day at the bottom and top. You have little to do here (indicating), and you are late in starting here (indicating).

Q. But on each of these exhibits you use the average from the beginning to the end?

A. That means that you follow this line as dotted across 71 instead of the solid line across exhibit 71, in arriving at the average rate of performance per day. We follow a straight line on each item which will develop the "S" curve [914] on the over-all—this is the "S" curve on the over-all (indicating).

Q. Well, Mr. Joslin, take the piping system: On October 27th what does our schedule show we should be finished?

A. That you should be ninety-five per cent complete on October 27th. If you are eliminating the miscellaneous items you are ninety-seven per cent.

Q. We show, without eliminating anything, that we should have completed ninety-five per cent?

A. Yes, sir.

Q. So that we have five per cent yet to perform? A. Yes, sir.

Q. On October 27th we have still five per cent of that work to complete? A. That is right.

(Testimony of William Edward Joslin.)

Q. And that schedule shows that we had fourteen days to finish that five per cent?

A. That is running the cross-hatch out to November 10th.

Q. But we were given fourteen days in which to finish?

A. You had to November 10th for the completion date.

Q. Then this one segment gave us fourteen days?

A. That is the proposed schedule.

Q. It allows fourteen days to complete five per cent?

A. This shows fourteen days left after ninety-five per [915] cent of the contract is completed.

Q. The progress schedule shows that we were entitled to fourteen days time after we had completed ninety-five per cent of the work?

A. It shows no such thing—it shows on October 27th that you were ninety-five per cent completed, and it shows on November 10th that you were ninety-five per cent completed.

Q. But that is a difference of fourteen days in which to do this five per cent of the work?

A. You haven't one hundred per cent designated on the progress chart. You show ninety-five per cent on October 27th, and the completion date is November 10th.

Q. Should we have one hundred per cent on November 10th we would have—

A. (Interposing:) That is on all of the items.

Q. Should we have one hundred per cent on

(Testimony of William Edward Joslin.)

November 10th, we would have fourteen days in which to do the last five per cent?

A. Your progress chart shows ninety-five per cent completion on October 27th, and you have—if you fall behind you have still fourteen days to pick it up, but you don't show any proposed time to be one hundred per cent complete. You retain that much time to pick it up.

Q. Assuming that we were ninety-five per cent complete [916] on October 27th, we had fourteen days to do five per cent of the work?

A. Assuming that you were 88.2 per cent complete, you still have fourteen days to complete over eighteen per cent of the work.

Q. If we were 88.2 per cent finished on October 27th, at the rate shown on the schedule—the progress schedule, what would be the rate of percentage per day that we were required to perform to do this balance of five per cent and be completed in the one hundred and twenty day period?

A. I don't understand that question. I don't know when you intended to complete. You do not show that.

Q. On the basis of having fourteen days to do the five per cent?

A. I know what you were doing on that job.

Q. Isn't it a fact that we would be required to do thirty-five one-hundredth per cent per day?

A. I know what you have done.

Q. But I am asking what would that average rate per day be?

(Testimony of William Edward Joslin.)

A. If you had fourteen per cent to finish, I still don't know what time you proposed to do that five per cent of the work in.

Q. Fourteen days. [917]

A. The progress chart does not show that.

Q. But we had fourteen days in which to finish.

A. The progress chart shows eighty-eight and two-tenths per cent on that date, as being completed.

Q. Our progress chart shows that we were supposed to be ninety-five per cent complete on October 27th, and we had five per cent to go on October 27th, according to our proposed schedule.

A. If you maintained the schedule, you mean?

Q. If we maintained our schedule we still had fourteen days in which to do the last five per cent of the work, according to the progress schedule?

A. If you had maintained your schedule you still had more than five per cent.

Q. Mr. Joslin, back to this "S" curve again: At the end of the "S" curve the rate of percentage is much less than it is in the middle of the "S" curve?

A. Providing you maintain the schedule?

Q. Well, let us suppose that we maintain our schedule, what per cent per day would be required of us to perform after we had ninety-five per cent of the work completed in order to get five per cent done in fourteen days? Is that $35/100$ of one per cent?

A. Yes; it would be. [918]

Q. On October 27th what were the actual figures of the percentage of work completed?

(Testimony of William Edward Joslin.)

A. 88.2, and no shortage of material in that segment.

Q. What remained to be performed?

A. 11.8 per cent.

Q. But using the schedule itself, the rate of performance from October 27th to November 10th would be 35/100 of one per cent?

A. That is what you say.

Q. Isn't it a fact that from October 27th at the same rate—isn't it a fact that we would have thirty-four days in which to complete the remainder of the contract? Is that right?

A. No; not thirty-four days—fourteen days, according to your figures.

Q. We had eleven and eight-tenths per cent to perform. If one performs 35/100 per cent per day, how many days would it take?

A. Where do you get the 35/100?

Q. I divided it.

A. That is a lee-way in case you are behind. That is why you have the fourteen days left. That is a lee-way in case you are behind your schedule.

Q. Well, let us take some specific example. Will you [919] look at Exhibit "T" and tell the Court how many days you allowed us, according to your estimate, in which to complete the brickwork on boiler No. 2? Isn't it a fact that you allowed us eleven days?

A. Is that the brickwork on boiler No 2?

Q. Yes; on No. 2.

A. That is right.

Q. Let me assume, if it is not a fact, that you

(Testimony of William Edward Joslin.)

show on October 27th that we were thirty-eight per cent complete? A. Yes, sir.

Q. And we had sixty-two per cent yet to perform? A. That is right.

Q. You gave us eleven days in which to complete this sixty-two per cent?

A. That is right. The job was on a one-shift basis. The specifications call for two shifts, holidays were necessary, and this was set up on a two-shift basis. You would double the proposed installation.

Q. Isn't it a fact that you used the average percentage rate performance per day in arriving at that answer?

A. The average straight through, because it is reflected in your own individual sheet as the Court may see. That shows a fairly certain average. Here is the last five per cent. It is consistent throughout.

Q. Now look and see if the curve—the “S” curve allows nineteen days to do the last sixty-two per cent, which you represented to the Court that we should get through in eleven days. Find it on the “S” curve.

A. We are not concerned with this “S” curve.

Q. But what we proposed to do was the last sixty-two per cent in nineteen days?

A. That is possible.

Q. In your exhibit “T” you require it in eleven days. How many days did the schedule allow us to do it in? A. You mean the brickwork?

Q. Yes.

A. This didn't—

Q. (Mr. Watts, continuing:) Schedule “T”

(Testimony of William Edward Joslin.)

shows that you estimated that we should finish the last sixty-two per cent of the work on Boiler No. 2, the piping system, in eleven days?

A. You mean this brickwork?

Q. Yes. I beg your pardon—the brickwork.

A. On two-shifts, that is the rate that is set up on. It is on a two-shift basis.

Q. You allowed us eleven days?

A. On the double shift.

Q. What does the progress chart allow us?

A. It shows nineteen days to do the last sixty-two per cent.

Q. Yes. And eleven days by your exhibit “T”?

A. And nineteen days by the progress chart, and I will clear that up.

Q. Surely.

A. Your progress chart shows that you will complete the brickwork on boiler No. 2 thirty days after the drums, tubes and headers are in place. Your progress chart shows that you will complete the work thirty days after these drums and tubes and headers are in, and twenty-nine days after the drums, headers and water-wall tubes are completed on boiler No. 3. That is what the progress chart shows, but what you actually did—

Q. (Interposing:) I am not asking you for that. What I want to know is, what the progress chart allows after thirty-eight per cent of this work is completed, and I say it allows nineteen days?

A. It also shows that you will be completed—that this [922] work will be completed a certain

(Testimony of William Edward Joslin.)

number of days after the drums, tubes and headers are in place.

Q. The only thing I want to know is, whether the progress chart shows that we are allowed nineteen days to complete after thirty-eight per cent of the work is finished?

A. It shows that you will be further advanced than the thirty-eight per cent.

Q. The question, Mr. Joslin, is, whether the chart shows that we are allowed nineteen days after thirty-eight per cent is completed in which to finish the work? A. Yes.

Q. Your exhibit "T" allowed us eleven days in which to complete eighty-two per cent of boiler No. 3 brickwork? A. That is correct.

Q. Will you tell the Court what the progress schedule shows that we are entitled to in days after thirty-eight per cent of that work is completed?

A. You are not entitled to anything, but if you maintain your schedule—

Q. (Interposing:) If we maintain our schedule we are allowed twenty-five days in which to complete that work?

The Court: Doesn't the chart show that the progress schedule was behind from the very start of this work?

A. On some of it, it does, your Honor. [923]

The Court: Generally, over-all, is that true?

Mr. Watts: Generally, it was behind schedule.

The Court: Then you were behind on this work?

Mr. Watts: Yes; on this work, behind the schedule.

(Testimony of William Edward Joslin.)

The Court: Then the question was not clear in the mind of the witness, possibly, as it was not in the Court's mind until you have now cleared it up.

Mr. Gibson: I was trying not to make any objections here in the interest of time.

The Court: I did not intend to interfere with this examination, but because the question was asked and it was answered by the witness, and I was simply wondering if the question assumed the condition as I understand it from the progress chart. I thought his answer was based on the progress chart, on the percentage of work shown.

Q. (Mr. Watts, continuing:) What I want to show is, in each one of these is that he has used a false premise.

Mr. Watts: I want to show that all of the testimony introduced by Exhibits "P" to "W" is based on the assumption that it is the accepted average. It is not the average per day under the "S" curve that has been spoken of, the percentage shown by the curve itself.

Mr. Joslin: That is a straight line and is developed from the chart itself. This curve will also develop itself [924]

Q. (Mr. Watts, continuing:) Will you answer this question—

A. (Interposing:) This (indicating) will give you the same thing right here, Mr. Watts.

Q. Will you answer this question, Mr. Joslin: The fact is that the chart shows here that we are entitled in which to do the last eighty-two per cent

(Testimony of William Edward Joslin.)

of the work twenty-five days on this brickwork on Boiler No. 2?

A. The chart shows that you will require twenty-five days to complete eighty-two per cent.

Q. And your exhibit "T" is based on the assumption that we should use only eleven days?

A. This represents a two-shift basis. This chart is on an eleven-day basis.

Q. Boiler No. 2 on the ash hopper, on October 27th that exhibit shows that we had done twenty-five per cent of the work? A. That is correct.

Q. So that on October 27th we had seventy-five per cent of the work yet to do?

A. This chart shows that you had taken fifty-eight days to do twenty-five per cent.

Q. You told the Court that we should complete this in three days by using two shifts?

A. That is correct. [925]

Q. Isn't it a fact that the chart allows us six days? A. On a single shift, yes.

Q. Now, on boiler No. 3 we had done five per cent of the work on October 20th?

A. On the ash hopper lining on October 20th there was five per cent done in fifty-three days.

Q. We had ninety-five per cent of that work yet to do? A. Yes.

Q. And you required us, according to exhibit "T", to do that work in four days?

A. I said that it could be done.

Q. The schedule allows us seven days?

A. On a one-shift basis.

(Testimony of William Edward Joslin.)

Q. Isn't it true in each segment you have taken the beginning date and the completion date, and averaged the percentage of performance per day?

A. That is correct, and that will develop the "S" curve.

Mr. Watts: I think that is a conclusion.

The Court: Go ahead with the questions.

Mr. Watts: If I have not done so, I will offer Exhibit No. 71 at this time.

The Court: I assume there is no objection, so it will be admitted. [926]

(Whereupon Plaintiff's Exhibit No. 71, so marked for identification, was admitted in evidence.)

Mr. Watts: And I also offer Exhibit No. 72.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 72, for purposes of identification.)

The Court: And it may be admitted.

(Whereupon Plaintiff's Exhibit No. 72, heretofore marked for identification was admitted in evidence.)

Q. (Mr. Watts, continuing:) Coming down to the measure of damages, I believe that you developed here yesterday that on boiler No. 1 there was an estimate of \$32,800.00 as the cost of the performance of that work? A. That is correct.

Q. And on the second, or boiler No. 2, you also brought that out as \$32,800.00 as the estimated cost? A. That is correct.

(Testimony of William Edward Joslin.)

Q. And boiler No. 3 shows \$33,400.00 as the cost?

A. Yes, sir.

Q. Will you take the progress schedule and on my exhibit No. 73, I wish you would mark opposite boiler No. 1 the number of days the plaintiff estimated it would take to do the work on that boiler No. 1.

A. Thirty-five days.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 72 for purposes of identification.) [927]

Q. Was it thirty-five, or thirty-two?

A. I think thirty-five.

Q. And have you marked that on Exhibit 73?

A. Yes.

Q. Now then, on boiler No. 2, will you take Exhibit 73 and mark the number of days estimated that it would take to do the work on that boiler?

A. Forty-one days.

Q. Have you so marked it?

A. Yes, sir.

Q. Now then, on boiler No. 3 will you do the same?

A. That is thirty-nine days.

Q. Now, what was the over-all time of performance of work on boiler No. 1?

A. The over-all performance was between the date of the contract and the date of completion, and the same is true on boiler No. 2, and the same on boiler No. 3.

Q. Do you mind looking at this Exhibit No. 64 and giving me the number of days for boiler No. 3 again, the number of days that it will require to set the drums, headers and water-wall tubes?

(Testimony of William Edward Joslin.)

A. The progress schedule that you proposed is thirty-nine days.

Q. Will you count those again? Isn't it forty-six days?

A. No, sir; it is forty-four days, though. [928]

Q. Do you mind erasing that mark of thirty-nine days and putting on Exhibit No. 73 "44 days"?

A. I have done that.

Q. Now, I hand you Exhibit No. 73, in its completed form it shows the cost of boiler No. 1 as \$32,800.00 and provided for thirty-five days to do the work? A. That is right.

Q. Isn't it a fact that the reason for the thirty-five days allowed for the work was that part of the work was done?

A. All I know is what you have on the chart.

Q. Do you know that part of the work was done on boiler No. 1? A. That is right.

Q. And we allowed thirty-five days to complete that work? A. That is right.

Q. And on the second boiler we allowed six days more, but the dollars and cents were the same?

A. Yes, sir.

Q. The last one we allowed nine days more, and allowed \$800.00 difference in the allocation of money for that boiler?

A. Yes, sir; that is what you show. That is the cost as represented by you here.

Q. In interpreting the schedule in terms of money and days, Exhibit No. 73 correctly reflects the amount of money [929] and the number of days?

(Testimony of William Edward Joslin.)

A. It reflects to me the fact that it cost \$32,800 to do this work in thirty-five days, and it cost \$32,800 on the second boiler to do the work in thirty-nine days—or, rather, forty-one days, that is, you accomplish in six days more work on the two with the same amount of money, and it also shows that you got \$33,400 to do forty-four days work. That cost is represented as being the same over here (indicating). You had more work on the second and the third, but your costs on this exhibit, which I think is an enlargement of your Exhibit No. 65, if I remember the number, the cost shown is identical per actual unit.

Q. But our schedule of time, however, allocated thirty-five days to do boiler No. 1?

A. Yes, and a hundred and five units.

Q. Boiler No. 2 shows an allocation of thirty-nine days?

A. This shows your expenditure the same as on No. 1, that you accomplished the same amount of work.

Q. There was more work on boiler No. 2 and No. 3 than there was on No. 1?

Mr. Gibson: They are talking now about money—

A. (Interposing:) If I may be permitted to finish my answer, I will grant that there was more work on boiler No. 2 [930] than on boiler No. 1, but they were done for the same unit cost.

Q. (Mr. Watts, continuing:) There was more

(Testimony of William Edward Joslin.)

work required to be done on boiler No. 3 than on boiler No. 1 and No. 2?

A. That is true, but you are including in your chart—your progress chart, additional items, taking into consideration that you place the additional items on your progress chart, it is all included and put down. The additional work he had to do he is compensated for. There are the air heater tubes on boilers No. 2 and No. 3 that are not on boiler No. 1. It was not on this boiler (indicating) and he has made an allowance of \$3,500.00 here on boiler No. 2; also on boiler No. 2 and boiler No. 3 there are cold air and gas ducts. That is not included in boiler No. 1. He had no cold air ducts on this boiler, and where he has duplicate work he has allowed the same amount of money. The duplicate items which are reflected in boilers No. 1, No. 2 and No. 3 are in the same amounts, and there is an allowance for the additional work on No. 2 and No. 3. That has been compensated for. On boiler No. 2 there is the item of brickwork which is marked with an allowance, or an estimate of \$3,050.00. That should be \$9,050.00. If you will add this and total it up you will find that it is a typographical error. That is the only item of cost greater in the first boiler, and that, I say, is an error. However, they are asking for [931] eight hundred dollars more to do the work on boiler No. 3, and they expect the cost to be eight hundred dollars more to do the same identical work.

Q. You know, as a matter of fact, that on ac-

(Testimony of William Edward Joslin.)

count of some material not being present that the Power Service Corporation had to pace their work accordingly?

A. I don't know what you mean by "pacing your work." On any contract you work as the work is available. I don't know what you mean by pacing the work.

Q. In the early stages of this contract the over-all picture shows that they were behind on some phases of the work, and on some phases of the work they were considerably ahead?

A. No. On no phases of the work were they ahead except one individual item, most of which was in place when they got there.

Q. Take the date of September 23rd on the "piping" schedule. That schedule shows that we should be what percentage complete on that work?

A. You should be sixty per cent complete on the over-all piping work—sixty-one and six-tenths per cent, as compared to what you had done—

Q. (Interposing:) What does the schedule show that we should have completed on September 23rd—I think you were [932] reading the wrong figure. On the piping system, what does it show?

A. Yes; I was. You proposed on the over-aall of the piping to be fifty per cent complete.

Q. And on that date we were 61.6 per cent complete? A. Yes, sir; that is right.

Q. The next item, which is boiler feed discharge and suction, on September 23rd the sched-

(Testimony of William Edward Joslin.)

ule called for seventy per cent completion on that work?

A. Yes, sir; that is right. On September 23rd the schedule proposed seventy per cent, and you were seventy-eight—the schedule called for seventy-eight, and you were seventy-eight per cent complete.

Q. I think it shows that we were 89.2 per cent complete?

A. 78, according to the chart I am looking at. You proposed to be 78 per cent complete, and you were 78 per cent complete.

Q. What item is that?

A. Boiler feed, discharge and suction.

Q. Will you look at the “low pressure exhaust and steam item”—that is No. 3?

A. As of September 23rd?

Q. Yes.

A. You proposed to be sixty-nine per cent complete, and you [933] were eighty-nine per cent complete.

Q. On September 23rd, Item No. 4?

A. I see. You proposed to be 66 per cent complete, and you were 80 per cent complete.

Q. 66 and 80? A. Yes, sir.

Q. The next, Item No. 5?

A. On Item No. 5?

Q. No; not Item No. 5. I am now looking at Item No. 4, what does that show?

A. That shows that you proposed to be fifty-five per cent complete, and you actually were sixty-three and eight-tenths.

(Testimony of William Edward Joslin.)

Q. Item No. 6, that shows zero as the proposed schedule, and fifty per cent actually done?

A. That is the drain and vent pipes?

Q. That is Item No. 6, on September 30th.

A. Yes; that shows zero as the proposed schedule.

Q. And we were actually completed fifty per cent?

A. Yes.

Q. Now, the auxiliary equipment, the schedule shows sixty per cent proposed, or required?

A. Is that of September 13th?

Q. Yes; I think that is the date.

A. What item is that?

Q. That is the over-all item. [934]

A. About thirty-eight per cent proposed, and actually forty—yes, about forty.

Q. And what about October 13th?

A. On October 13th you had proposed sixty per cent, and you were actually 63.7 per cent complete.

Q. Now, what about the ash handling units on October 13th?

A. You proposed to be seventy per cent finished, and you were seventy-five.

Q. What about the combustion and control instruments?

A. On October 13th you were proposed to be fifteen per cent complete, and you were twenty-seven per cent actually.

Q. So that as a matter of fact, on many of the items because of interruption in schedules from

(Testimony of William Edward Joslin.)

time to time the plaintiff was behind in some items, but on the other items he was ahead on some of them—on a good many items?

A. Well, during certain progress of the job, certain items would naturally be ahead, but the over-all was behind at all times.

Q. That is true. When the check was given by you on March 19th for one thousand dollars, you still owed one thousand dollars on the contract price, did you not?

A. There was one thousand dollars retained prior—

Q. (Interposing:) That one thousand dollars does not purport [935] to cover any damages allowed for failure to deliver material on time?

A. No; no damages.

Q. It was the small balance due on the contract? A. Yes, sir.

Mr. Watts: That is all.

Redirect Examination

By Mr. Gibson:

Mr. Watts: Pardon me. I forgot to offer in evidence the exhibit I had marked as 73.

Mr. Gibson: I have no objection to it.

The Court: It may be admitted simply as an illustration.

Mr. Scholz: What do you designate that?

Mr. Watts: That is designated as a progress schedule break-down.

(Testimony of William Edward Joslin.)

(Whereupon Plaintiff's Exhibit No. 73, heretofore marked for identification was admitted in evidence.)

Q. (By Mr. Gibson:) The black solid line—the pen line showing across the face of the schedule which council has referred to as the “S” line, or “S” curve, it represents the proposed percentage of accomplishment at any particular time, or on any particular day from the time they start at zero until they wind up the contract, that is, within the terms of the contract? [936]

A. The “S” line, or curve, reflects the amount of work accomplished from day to day, and the amount proposed to be accomplished from day to day, and is developed in this way: At first only a small portion of the work is done, at the very start, or at the first, and the line is flat, and then it steepens and the various items are completed as shown in the center, or the middle of the line, and then there is a flat part at the bottom which allows you time to pick-up what you may have lost in the center.

Q. You mean there is a flat place at the top, the zero, or starting point is at the bottom?

A. Yes; that reflects the amount of work which you propose between the start and the finish.

Q. And the dotted line is the actual amount of completion?

A. That reflects the amount of work at any time, at any particular date.

Q. And it reads in percentages?

(Testimony of William Edward Joslin.)

A. Yes, sir.

Q. And that is a summary of the various segments on the particular job in progress?

A. That is correct.

Q. A statement was made that you had recommended against giving this contract to any subcontractor, and later on suggested a cancellation of the contract with reference to your own contract with the A-E-M, under which you were paid a certain [937] percentage. Was there to be any provision in that of the same percentage that you might procure, even though the contract was not directly with you?

A. No. On subcontracts let by our government they would not allow a second profit; in other words, on a cost plus a fixed fee, we were given our percentage, and it was seven-tenths of one per cent of the amount of work that we had at that time, and when they let a subcontract we, as the prime contractor—we were allowed a fee of one-tenth of one per cent of our fee in existence at that time. This contract for one-half million dollars, our fee on that contract would have been approximately \$350.00. We got one-tenth of seven-tenths of one per cent for financing that, and supervising it.

Q. The A-E-M had their general contract?

A. They got their regular fee.

Q. Any contract with the A-E-M, to which this contract is tied in, is there a provision that they can stop any part of the work at any time?

(Testimony of William Edward Joslin.)

A. There is a provision in it, yes.

Q. And that would follow in any work under your control?

A. On any subcontract which was let, the insulation work which was let to various subcontractors, and the Power Service Corporation contract for power house No. 1.

The Court: Could they suspend for five or ten days [938] and require you to go ahead?

A. Yes; in fact, we were ninety per cent completed on what we called the "B" line. It was the smokeless powder line—about ninety per cent completed, and they suspended all operations on that line because they got a new development in that sort of powder. We started to put in what we called Line "E". We also called that the stick powder, and that was about ninety-five per cent completed when suspension of operations was ordered on that, and then we went on what we called the "G" line, and we got that line about ninety per cent completed when it was ordered suspended, and we went on the "F" line, and they got a new rocket powder, and ordered that suspended. We left those three lines which were terminated during this period, and then when the Bulge Invasion was going on, they ran short of smokeless powder, and then they issued orders to place lines "B" and "C" in operation. Now, that was closed to a year and a half after they were placed under suspension.

The Court: Was there any reason — in case

(Testimony of William Edward Joslin.)

there was delay on account of the manufacture of water-wall tubes or headers—why the Government could not have suspended this contract for ten or fifteen days until they could get these headers and tubes?

A. If the Government felt that it was desirable they [939] could have done that, but we could not do that. That would have to come from the Government. Since the Power Service Corporation was doing this work, we couldn't, and wouldn't recommend a suspension of operations.

Q. (Mr. Gibson, continuing:) In this matter with reference to the tubes, headers and drums, after a certain period of time certain tubes that were on the ground there were determined to be defective, and orders were issued about August, the latter part of August, or September the first—do you recall such a requisition for some thirty-two tubes to replace the defective ones?

A. Yes; I remember that.

Q. I believe the requisition was on August 31st, or September 1st. After that the tubes were delivered to the site about what time, Mr. Joslin?

A. The last tubes were delivered on September 20th, or the 26th. I don't remember which.

Mr. Gibson: I believe that is all.

Redirect Examination

By Mr. Scholz:

Q. Mr. Joslin, if the additional clause on the signature page of the contract, if that had added anything more to the contract, that is, any burden

(Testimony of William Edward Joslin.)

on you, wouldn't your contract, or would it, have been revised because of this claim, or because [940] of the additional burden on you, or would that be included in your original contract?

A. I might answer that by saying—you are asking if it would be necessary to revise the contract. I might say I assumed that any appendage to the contract would have to revise the contract, or the contract would have to be revised, but apparently I was wrong, because they added that to the signature sheet of the contract. If you will look back in the correspondence I believe I stated that I thought it would be necessary, but I was wrong, inasmuch as they did attach it to the contract.

Q. That does not answer my question. If this clause added to the signature page of the contract added to the responsibility, your responsibility, and the claim of the plaintiff, what effect would that have on a contract with the Government? Would you have to revise your contract with the Government?

A. I don't think it would have any effect. Personally, I don't think so.

Q. You considered that didn't add anything to the contract?

A. That is my personal opinion.

Q. I believe in answer to one of Mr. Watts' questions you stated that you were obligated to have the material on [941] hand so that the Power Service Corporation could complete their contract in time—if it could be done, I think your answer

(Testimony of William Edward Joslin.)

was. Now, I don't know of any clause in the contract that obligates you to deliver any material to the plaintiff at any time.

A. I don't know of any clause in the specifications that makes it obligatory on us to deliver any material of any nature on any date. Provision was made for us to deliver material and expedite it at the earliest possible date.

Q. After requisition was made, or without requisition?

A. After the requisition was in, and a definite shortage was established.

Q. Mr. Joslin, Mr. Watts asked you on Exhibit "T", I believe it was—he said you gave the Power Service Corporation eleven days in which to complete some certain portion of the work, and that the "S" curve, which has been referred to, gave the Power Service Corporation nineteen days. Is there any difference on these two, and if so, can that difference be reconciled? A. Yes.

The Court: I want to say that he has it all reconciled as far as I am concerned. I can see Mr. Joslin's theory, and I can see the plaintiff's theory as explained by Mr. Watts. They are both very plain to the Court.

Mr. Scholz: Then I will not go into that. [942]

The Court: It is not necessary, as far as the Court is concerned. However, I don't want to stop you on this. We have spent this much time, now we might as well go ahead.

Mr. Scholz: That is all.

(Testimony of William Edward Joslin.)

Mr. Gibson: This is Defendant's Exhibit "Y" that I have now.

(Whereupon document referred to was marked Defendant's Exhibit "Y" for purposes of identification.)

Mr. Gibson: We offer that subject to any objection that counsel may see fit to make.

Mr. Scholz: What is that?

A. This is a chart enlarged showing the actual percentages of completion, particularly on boilers 2 and 3, of the brickwork, between certain dates, particularly between October 20th and November 17th, 1944. The Power Service Corporation's Exhibit No. 62 shows that the brickwork on boiler No. 2 will be completed in thirty—no; I guess it was thirty-one days after the drums, headers and tubes were completed on boiler No. 2. They show that the brickwork on boiler No. 3 will be completed in twenty-nine days after the drums, tubes and headers are in place. Now that is from zero to one hundred per cent. Here is what they accomplished in twenty-nine days.

Q. (Mr. Scholz, continuing:) What do you refer to now? [943]

A. The large schedule, the thirty day schedule, of the Power Service Corporation.

Q. But this is Exhibit "Y"?

A. Yes, sir; Exhibit "Y".

Q. Go ahead.

A. On October 20th they were thirty per cent completed on boiler No. 2, and eighteen per cent

(Testimony of William Edward Joslin.)

complete on boiler No. 3. On October 27th they were thirty-eight per cent complete on boiler No. 2, and twenty-six per cent complete on boiler No. 3. On November 3rd, they were forty-eight per cent complete on boiler No. 2, and thirty-six per cent complete on boiler No. 3. On November 10th they were sixty-seven per cent complete on boiler No. 2, and fifty per cent complete on boiler No. 3; on November 17th they were ninety-two per cent complete on boiler No. 2, and sixty-five per cent complete on boiler No. 3; of what they proposed to do in thirty days they actually accomplished 54.5 per cent completion in twenty-nine days.

Q. Was that after the drums, tubes and headers were placed?

A. After the drums, tubes and headers were in place. That is what they actually accomplished.

Mr. Scholz: That is all.

Mr. Gibson: That is all I have.

Recross Examination

By Mr. Watts:

Q. Do you know, Mr. Joslin, what the Power Service [944] Corporation was doing, what kind of work they were doing in this period of time between October 20th and November 17th?

A. I know that the brickwork was a separate contract which the Power Service Corporation was responsible for—it was their responsibility to see that the schedule was maintained. I don't know what the Power Service Corporation was doing at that time.

Mr. Watts: That is all.

Mr. Gibson: That is all.

The Court: You may call your next witness.

EDWARD M. GEORGE,

a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Gibson:

Q. Will you state your name?

A. Edward M. George.

Q. And your business or occupation?

A. Retired officer in the regular army.

Q. What was your position or occupation prior to retirement?

A. When I was retired I was a colonel in the engineering corps in charge of construction in eight western states. [945]

Q. What was your title in connection with that?

A. Division Engineer.

Q. What territory did that embrace?

A. Washington, Oregon, California, Idaho, Utah, Nevada, Colorado, Montana, and at certain periods there were portions of Arizona and Wyoming.

Q. What was the date of your retirement?

A. The 28th of September, 1944.

Q. You were on active duty in 1941, 1942 and 1943?

A. Yes, sir.

Q. For what period of time were you District Engineer?

(Testimony of Edward M. George.)

A. I was never District Engineer.

Q. I guess you referred to it as Division Engineer?

A. I was Division Engineer in the Mountain States Division with headquarters at Salt Lake City, Utah, for some time. In the Pacific Division, for one year and six months. Prior to that time I was Zone Constructing Quartermaster. Prior to that time the construction was turned back to the engineers covering the same territory.

Q. How many years have you had experience in Government construction contracts?

A. I have been purchasing, contracting and disbursing officer for twenty-five years prior to retirement.

Q. In connection with that, did you have charge of construction contracts? [946]

A. Exclusively; I had no other duties except construction work.

Q. You are familiar with contracts, and particularly with progress schedules such as have been discussed here the last couple of days?

A. Yes.

Q. When a progress schedule is approved, and certain shortages of materials have developed, which threw the contractor or subcontractor off his estimate—his estimated completion, or percentage of completion for a period of time, and then the materials—all of the materials necessary, arrive for the complete construction of the project, is there any reasonable excuse thereafter for the

(Testimony of Edward M. George.)

subcontractor not to maintain his estimated percentage of completion within the terms of his contract?

A. As I understand that question, it involves the period of time after the receipt of all materials?

Q. Yes.

A. My answer to that is no.

Q. During the war, was a delay of from thirty to thirty-nine days in the completion of a contract which originally estimated to be completed in a one hundred twenty day period, would that complete be considered unreasonable, provided the contracting officer deemed the delays not harmful to the war effort? [947]

A. It was very common to all contracts of any magnitude in which the Government was interested, or which was a Government contract, and the Government was not being damaged, or the war effort delayed, which was entirely up to the contracting officer to decide, and under those conditions, if there was no delay to the war effort, and the Government was not damaged, there was no push exerted. However, if the war effort was delayed, or the Government was being damaged, then it was our job to get in and needle the people to the point of making delivery.

Q. That was your job?

A. That was one of them.

Q. During the war were delays in construction work because of shortage of material during the construction a frequent occurrence?

(Testimony of Edward M. George.)

A. Very frequent.

Q. And were they frequently considered—or let me ask you: Were they, or was that condition, considered a hazard common to construction jobs during the war?

A. Before the war and during the war.

Q. Colonel, assuming that a building—the rock and concrete work of a building was in, and that this building was a power house, or intended for a power house, that a subcontractor was to install property of the total value of around \$1,150,000.00 into the complete power house, that there were three boilers to [948] install, and the accessories, would the period of one hundred and twenty days be a reasonable time for the completion of such a project?

A. It is my opinion that the time is ample.

Mr. Gibson: There is no further questions.

The Court: Do you have any questions to ask this witness, Mr. Scholz?

Mr. Scholz: No questions.

Mr. Watts: No cross examination.

Mr. Gibson: I would like to ask one more question:

The Court: Very well.

Q. (Mr. Gibson, continuing:) Colonel, you, on behalf of the Government, had charge of construction work amounting to a considerable amount of money?

A. I let something over one billion three hun-

(Testimony of Edward M. George.)

dred million dollars worth of contracts in one year.

Q. And—

Mr. Gibson: Is there any other question the Court would care to ask, or would care to have me ask this witness?

The Court: I don't think of anything.

Mr. Gibson: I will ask this one other question:

Q. (Mr. Gibson, continuing:) When a contractor makes a bid and receives his notice the bid is accepted, and he receives and signs for the notice to proceed, is that considered a contract [949] as between the parties—a completed contract between the parties as of that date?

A. That is my practice, and it is in accordance with the regulations and the law.

Mr. Gibson: That is all.

Mr. Watts: No questions.

The Court: Then I understand both sides rest.

Mr. Watts: The plaintiff has no rebuttal.

Mr. Gibson: We have rested.

The Court: Then this matter will be taken under consideration, and together with the determination of the case the Court will determine the motions presented, that is, I will take into consideration the motions that have been presented during the trial of the case.

Mr. Gibson: Very welll.

The Court: The exhibits, as there are a great many of them involved in this case, will be made available through the Clerk's office to counsel in working on their brief, as I imagine it will be of some assistance to them.

Mr. Watts: That will be appreciated, I am sure although I do have copies of my exhibits.

Mr. Gibson: I will be very glad to have the use of the exhibits.

(Which was all of the evidence and proceedings adduced in the foregoing case.) [950]

REPORTER'S CERTIFICATE

United States of America,
State of Idaho, County of Ada—ss.

I, G. C. Vaughan, the duly appointed, qualified and acting Official Reporter of the United States District Court for the District of Idaho, do hereby certify that I reported in shorthand the evidence and the proceedings adduced on the trial of the foregoing case, which was tried in San Francisco, California, before the Honorable Chase A. Clark, District Judge, beginning on the 18th day of March, 1947, and I thereafter caused said shorthand notes to be transcribed into longhand type-writing, and that the within and foregoing constitutes and is a full, true and correct copy of the transcript of the evidence and proceedings adduced at said trial, consisting of nine hundred and fifty-one pages.

In witness whereof, I have hereunto set my hand this the 12th day of July, A.D., 1947, at Boise, Idaho.

/s/ G. C. VAUGHAN,
Official Reporter,

[Endorsed]: Filed June 7, 1948. [951]

[Endorsed]: No. 11992. United States Court of Appeals for the Ninth Circuit. Power Service Corporation, a Corporation, Appellant, vs. W. E. Joslin, doing business as Cory-Joslin and Macnsons, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 22, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 11,992

POWER SERVICE CORPORATION,
a corporation,

Appellant,

vs.

W. E. JOSLIN, doing business as
CORY-JOSLIN & MACNSONS,

Appellee.

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant intends to rely in this appeal are that the Trial Court erred:

1. In awarding plaintiff damages in the amount of Three Thousand Seven Hundred Fifty-three &

15/100 Dollars (\$3,753.15) instead of in the amount of damages established by the evidence, to-wit, the sum of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88).

2. In its Findings of Fact No. 32 holding that appellant was delayed only two days on Boiler No. 1, instead of sixteen days as shown by the evidence.

3. In its Findings of Fact No. 33, holding that appellant was delayed only seven days on Boiler No. 2, instead of thirty-seven days as shown by the evidence.

4. In its Findings of Fact No. 34, holding that appellant was delayed only six days on Boiler No. 3, instead of forty-four days as shown by the evidence.

5. In its findings of Fact No. 35, holding that appellant was delayed a total of only fifteen days in completing its contract, and in the court's failure to find from the evidence that the appellant was delayed from November 10, 1944, to December 19, 1944, a total of thirty-nine days.

6. In its Findings of Fact No. 39, in which the court arbitrarily determined that the loss to appellant amounted to Two Hundred Fifty & 21/100 Dollars (\$250.21) daily, and in its failure to find from the evidence that the total damages amounted to Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88) made up of the following distinct and clearly established items of damage, to-wit:

Item 1:	Extra cost of equipment rental.	\$ 2,255.50
Item 2:	Extra cost of Supervisory personnel (except Borst).....	8,267.53
Item 3:	Extra cost of 90 days additional time and expense—Borst....	2,542.31
Item 4:	Home Office overhead.....	6,649.82
Item 5:	Loss in Efficiency.....	14,611.72
		<hr/>
		\$34,326.88

7. In its Conclusion of Law No. 5, insofar as the court held that plaintiff's damages were limited to the amount set forth in its amended claim.

8. In its Conclusion of Law No. 6, holding that appellant could not recover in excess of \$10,008.70, being the amount specified in its original claim dated June 30, 1945 (plaintiff's Exhibit 35).

9. In its Conclusion of Law No. 7, holding that appellant could not recover on any element of damages not included in its claim of June 30, 1945.

10. In that part of its Conclusion of Law No. 9 which held that appellant was entitled only to recover damages in the amount of Three Thousand Seven Hundred Fifty-three & 15/100 Dollars (\$3,753.15), instead of Thirty-four Thousand Three Hundred Twenty-six & 88/100 Dollars (\$34,326.88), as established by the evidence.

11. By disallowing, in its computation of damages, all overhead expenses established by the evidence, to-wit, the sum of Six Thousand Six Hundred Forty-nine & 82/100 Dollars (\$6,649.82).

12. In that its opinion and decree are not supported by evidence and are contrary to law.

13. In that its opinion and decree are not supported by its Findings of Fact.

14. In that its opinion and decree are contrary to its Findings of Fact and the law.

15. In that its decree as to the amount of delay and the measure of damages is clearly erroneous and is not based upon substantial evidence.

/s/ LANCIE L. WATTS,
Attorney for Appellant.

(Service Statement attached.)

[Endorsed]: Filed August 16, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPLICATION FOR ORDER TO DISPENSE
WITH PRINTING OF EXHIBITS

1. Comes now the Appellant and moves the Court for an Order to dispense with the printing of the exhibits in the printed record of this appeal, and to allow appellant and appellee to refer this Court in the printed record, in the Brief and in the oral argument, to the original exhibits, and as grounds therefor, appellant states:

2. That the Record prepared by the Clerk of the District Court, and transmitted to this Court as the Record on Appeal, under order of the Trial Court,

contains all original exhibits for the inspection of this Court.

3. That there are 73 original exhibits offered by the plaintiff below, a list of which, marked "Exhibit A," is hereto attached and made a part hereof, and 25 exhibits offered by the defendant below, a list of which, marked "Exhibit B," is hereto attached and made a part of this Motion.

4. That these exhibits consist of letters, voluminous contracts, construction material inventories, requisitions for construction materials, construction material invoices, blue prints, construction schedules, payroll records, charts, graphs and pictures.

5. That many of the exhibits were copied into the transcript by the Reporter, and the pertinent one dealing with the amount of delay and the measure of damages are included in appellant's "Designation to Print," and to print the original exhibits would result in duplication and unnecessary expense.

6. That appellant's appeal is concerned only with the amount of delay found, and the measure of damages applied by the Trial Court.

7. That this application is made in the interest of economy.

/s/ LANCIE L. WATTS,
Attorney for Appellant.

(Statement of Service attached.)

[Endorsed]: Filed August 19, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER

Now on this date, the Court having read Appellant's Application for an Order to dispense with the printing of exhibits, and to permit appellant and appellee to refer this Court in the printed record, the Brief and the oral argument to the original exhibits, and for cause shown in said Application,

It is ordered that the printing of all original exhibits be dispensed with in the printed Record herein, and that appellant and appellee be allowed to refer this Court in the printed Record, the Brief and in the oral argument, to the original exhibits.

Dated August 19, 1948.

/s/ WILLIAM DENMAN,
U. S. Circuit Judge.

[Endorsed]: Filed August 23, 1948. Paul P. O'Brien, Clerk.